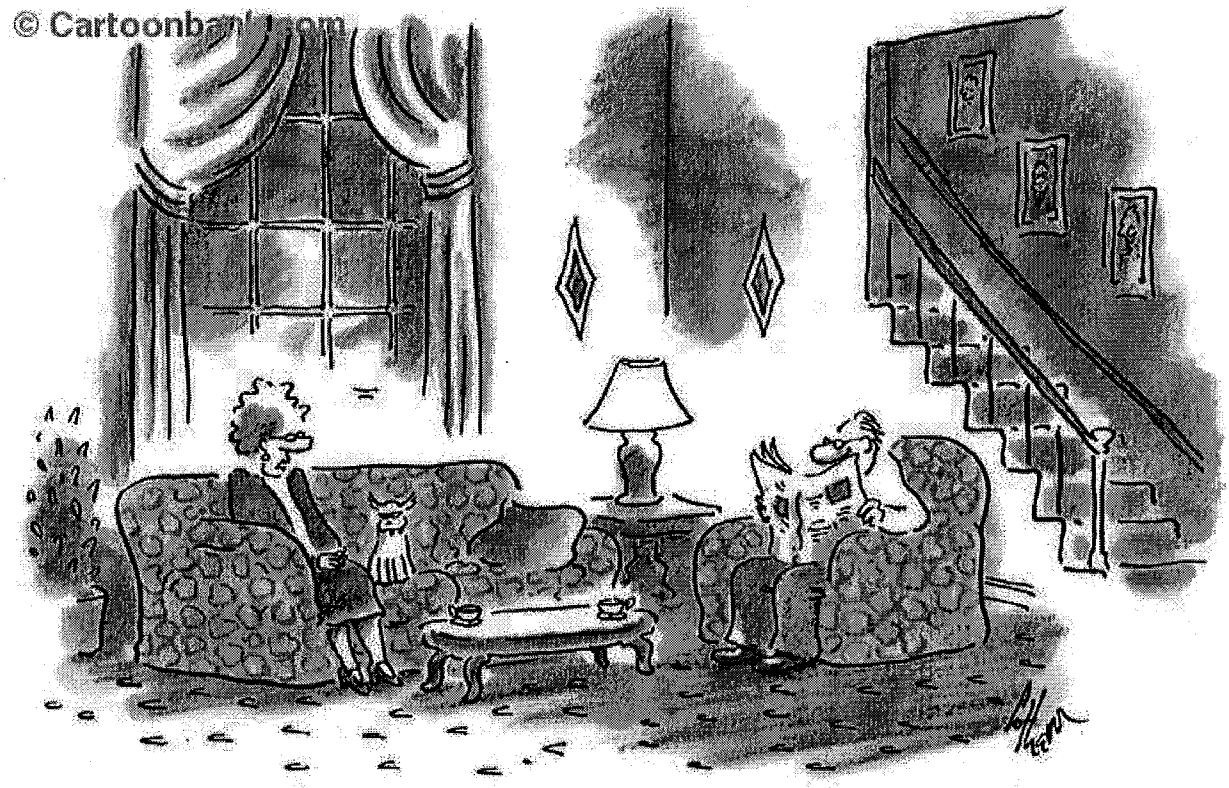
AGENDA
TEXCOM MEETING

Trusts and Estates Section
State Bar of California
Saturday July 19, 2008
LAX Marriott
Breakfast from 9:00 AM; Meeting 9:45-3:00 PM



"Let's update our will and go on vacation."

I. WELCOME, INTRODUCTIONS, AND REPORTS OF CHAIR/VICE CHAIR AND ADMINISTRATOR (10 minutes)

A. Welcome [Stern]
B. Approval of Minutes of June 14, 2008, Meeting [Stern]
C. Report of Chair (5 min)— [Stern]
D. Report of Vice Chair (5 min)
Finance and Budget – Financial Report; [Tong]
E. Report of Section Administrator [Orloff]

COMMITTEE, TASK FORCE, AND LIAISON REPORTS

II. LEGISLATION (15 minutes) [REGGIARDO]

A. Timeline for TEXCOM legislative proposals—
B. Priorities for Bills Presently in Legislature
C. Mandatory procedures re legislative proposal format
D. Mandatory procedures re position papers format
E. Online Bill Tracking legislative information:
www.leginfo.ca.gov/ [GO TO THIS SITE FOR TEXTS OF ANY BILLS THAT HAVE NOT BEEN UPLOADED TO THE AGENDA PACKET]
CapitalTrack sites (See Legislation Committee Workroom Folder)

IMPORTANT GUIDELINES:

- Please use approved format for legislative proposals.
- Please use approved comment form for legislation comments.
- Always write to Saul Bercovitch, not directly to a member of legislature or legislative staff.
- Contact our lobbyist Ray LeBov for hands on assistance in Sacramento
- Confirm testimony needs with Legislation Chair.
    - If you agree to testify, be there unless otherwise notified.

Bills, by Subcommittee:

(1) Trust-Estate Administration

a. AB 171 (Beall) Filing Fees [POTTS]
b. SB 1407 (Perata) Fees [POTTS]
b. SB 1421 (Harman-Trust admin-Inc. and Principal) [BURGER]
Recommendation: Support if amended as proposed
c. AB 2642 (Niello-Unclaimed Property)
Recommendation: Follow [SCHENONE]
d. SB 1319 (Machado-Unclaimed Property)
Recommendation: Follow [SCHENONE]

(2) CLRC:

a. SB 1264 (Harman—Wills and Trusts—NO CONTEST)
Recommendation: SUPPORT IF AMENDED [HORTON]
[to Governor 7-10-08]

(3) Estate Planning

a. SB 685 (Yee-Pet Trust) Recommendation: Support [SCHENONE]
[to Governor 7-10-08]
b. AB 2452 (Davis-Notaries-Fees and Educational Requirements)
Recommendation: Follow [EHRMAN]
[Chaptered, ch. 67, stats 2008]
c. SB 1066 (Migden-Domestic Partnerships) [SCHROTH]
Recommendation: Follow
d. SB 1396 (Cox-Recording Fees) [EHRMAN]
Recommendation: Follow
e. AB 3000 (Wolk-Health Care Decisions) [SCHENONE]
f. AB 2248 (Spitzer-wills)
[Chaptered, ch. 53, stats. 2008]

(4) Incapacity

a. SB 1140 (Steinberg-Financial Abuse) [COREY]

b. SB 483 (Kuehl-Medi-Cal DRA Implementation)
Recommendation: Follow [Stern]

c. AB 225 (Beall—TROs, elder abuse)
Recommendation: Follow [LEE]

d. AB 2014 (Tran—Out of state property)
TEXCOM bill [BROWN]
[Chaptered, ch. 52, stats. 2008]

(5) Conservatorship Working Group

a. SB 800 (Corbett-Conservatorships-JC Task Force) [LODISE]
Recommendation: OPPOSE UNLESS AMENDED

b. AB 1340 (Jones-Conservatorship cleanup) [Stern]

(6) Educating Seniors

a. AB 2149 (Berg-Investment Advisors)
Recommendation: Follow [SALLUS]

b. AB 2150 (Berg-Sales Designations) [SALLUS]

III. CEB (2 minutes) [GOOD]

IV. QUARTERLY (3 minutes) [HAYES]

V. EDUCATION (10 minutes) [ITO]
A. Monterey Annual Meeting Programs
B. Roadshow: LA, 11/14/08
C. SEI: 1/09
D. Development of New Speakers
E. Your Legal Rights **[EHRMAN]**

VI. LITIGATION (5 minutes) [ZABRONSKY]
A. Trustee notification issue—see Item XVI

VII. MEMBERSHIP AND MARKETING (5 minutes) [LAWSON]
A. Liaison with other Sections to expand program outreach
B. Update of Section's Marketing Materials

VIII. NCCUSL (2 minutes) [FITZPATRICK]

IX. INCOME/TRANSFER TAX (10 minutes) [JAECH]
A.California fiduciary income tax developments [HAYES]
B. News on the Estate Tax Front
C. Property Tax-Co-tenant transfers

X. TECHNOLOGY (5 minutes) [GAW]
A. E-News
B. Workroom issues

XI. ELECTIVE ADMINISTRATION OF TRUSTS AND ESTATES [BURGER/HARTOG] (2 minutes)

XII. CONFERENCE OF DELEGATES (2 minutes) [HENDEN]
A. Status of Follow Up from Retreat Decisions of TEXCOM

XIII. EDUCATING SENIORS (10 minutes) **[SALLUS]**
A Senior Information Cards
B. Speakers Bureau Update

XIV. INCAPACITY COMMITTEE (25 minutes) **[LODISE]**
A. Professional Fiduciaries Bureau [Matulich]
B. Probate Code section 1470 (Appointed counsel for the already Represented) [Beltran-Lee]

XV. CONSERVATORSHIP WORKING GROUP (5 minutes) [COREY]
See Item 3, Legislation.
A. AB 2247: New Approach for our conservatorship investment project [Stern]

[WORKING LUNCH—TO START AT NOON]

XVI. TRUST - ESTATE ADMINISTRATION (60 minutes) [BURGER]
A. Trustee notification issue (PC 16061.7) (45 minutes) [BURGER; BAER]
B. Section 16350; Hasso v. Hasso (5 minutes) [SCHENONE]
C. 15400 et seq.: Trust reformation project and Related matters (10 minutes) [REGGIARDO]

XVII. ESTATE PLANNING (15 minutes) [MacDonald]
A. Rule against perpetuities (2 minutes) [GAW]
B. Statutory Power of Attorney—PC 4462(b), 4264(d), 4457(d)—Conformity of powers issues (5 minutes) [HOWARD]
C. Anti-Lapse Statutes—Conflict with Intentional Disinheritance—PC 21110, 21111 (5 minutes) [EHRMAN]
D. In Re Marriages (2 minutes) [REGGIARDO]
LUNCH

XVIII. CLRC (15 minutes) **[HORTON]**
A. Restrictions on donative transfers-Report on CLRC recommendations
B. Attorney-client privilege after death-Status
C. AB 250—THE SEQUEL [ITO]

XIX. ETHICS (2 minutes) **[LODISE]**
A. RRC : Status of rule reform

XX. NEW BUSINESS

XXI. COMING ATTRACTIONS

NEXT TEXCOM MEETING

ANNUAL MEETING: MONTEREY, September 25-28
ORIENTATION, September 27, 1-4pm
MEETING OF NEW
SUBCOMMITTEE CHAIRS, September 27, 4 pm
COCKTAILS AND DINNER, FRESH CREAM RESTAURANT,
September 27, 2008, 6pm-9pm
TEXCOM meeting, Marriott, 9 am-3 pm,
September 28, 2008

Executive Committee
Trusts and Estates Section
State Bar of California
Oakland, California
June 14, 2008

Members Present: Peter S. Stern (Chair), May Lee Tong (Vice-Chair), David W. Baer, Thomas E. Beltran, James J. Brown, Jr., Jeremy B. Crickard, Richard L. Ehrman, Bette B. Epstein, Nancy E. Howard, Charlotte K. Ito, Jayne C. Lee, Barry K. Matulich, Marc L. Sallus, Bart J. Schenone, and Rebecca L. Schroff.

Members Absent: Andrew Zabronsky.

Advisors Present: Richard A. Burger, David B. Gaw, Margaret M. Hand, John A. Hartog, Philip J. Hayes, Neil F. Horton, Jeffrey A. Jaech, Catherine A. Lawson, Margaret G. Lodise, Ruth A. Phelps, and Silvio Reggiardo III.

Advisors Absent: Edward J. Corey, Jr., Barry C. Fitzpatrick, Kay E. Henden, James B. MacDonald, Tracy M. Potts, and Adam F. Streisand.

Others Present: Don E. Green (Judicial Liaison), Saul Bercovitch (Legislative Counsel – by telephone), Leonard W. Pollard II (Reporter), Suzanne Good (CEB), and Susan Orloff (Section Administrator).

I. WELCOME, INTRODUCTIONS, AND REPORTS OF CHAIR/VICE CHAIR AND ADMINISTRATOR

A. Welcome [Stern]

Chair Stern welcomes TEXCOM to his 6th meeting. And he particularly welcomes home former Chair Hartog and Ms. Hand from their travels in France. Chair Stern also acknowledges Mr. Matulich's son, Kevin, who is observing today's meeting; he is a junior at UCSB, with some interest in being a lawyer.

B. Approval of Minutes of May 2-4 Meeting [Stern]

At page 3, in the second TEXCOM action, duplicate words were deleted; at page 5, in the first TEXCOM action, the word "sustain" becomes "abstain;" at page 14 under Professional Fiduciaries Bureau, Ms. Yang's title is corrected to be Chief of Professional Fiduciaries Bureau of Department of Consumer Affairs; and at page 38 under Rule 1.7, line 4, the word "confirmation" should be "information." Otherwise, TEXCOM unanimously approves the May Minutes.

C. Report of Chair [Stern]

Chair Stern says that, at the last meeting, TEXCOM approved an amendment to the Section's Bylaws, which he has now sent to the Board of Governors. The Board may act on that amendment during their meeting this weekend.

Chair Stern says that the State Bar asks our thoughts on whether its annual meeting might be held outside of California. Mr. Sallus quickly responds that our educational programs at the annual meeting have quite good attendance. If prospective attendees must travel further, then attendance may fall off. Mr. Sallus also notes that the State Bar has found that only Monterey, San Diego, and Anaheim were available for annual meeting location sites. He wonders why San Francisco, Los Angeles, Long Beach and other potential sites are not similarly available. Mr. Sallus moves to oppose having the annual meeting outside of California. Chair Stern senses a swell of comments building in TEXCOM and defers a vote on the motion until after lunch.

Promptly upon returning from lunch, Mr. Sallus restates his motion to oppose any change in the State Bar charter or bylaws to allow the annual meeting to be held out of State. Ms. Orloff cautions that a State Bar Task Force is revisiting the vitality of the annual meeting. Last year, only 2,000 attorney members attended out of a body of 200,000 members strong, representing 1% attendance. The State Bar is reflecting on better ways to serve attorneys. TEXCOM votes on Mr. Sallus' motion:

TEXCOM action: Aye – 13; no – 12.

Mr. Bercovitch notes that we need to send a written communication that should disclose the very close nature of the vote. Smiling, Mr. Hartog moves that Mr. Sallus draft that letter.

TEXCOM action: Aye – 5; no – 12.

However, Chair Stern rules that who drafts letters is not a proper subject for a vote. He asks Mr. Sallus to write that letter, disclosing the close nature of the vote.

D. Report of Vice Chair
<u>Finance and Budget</u> – <u>Financial Report</u>;

A one-page handout is a Trusts and Estates Section – Financial Summary for Period Ending April 30, 2008. Ms. Tong references Consolidated Expenditures – Internal Allocation of $127,265. This is our State Bar assessment that is paid twice per year. Ms. Tong notes that our 2007 Carry Forward is $419,669. However, there is a small error under the heading of "Summary of Total Available Assets as of April 30, 2008." The Balance of Assessment for 2008 is listed as $254,530; that is an error; the correct amount is one-half that amount, or $127,265. Returning to Consolidated Expenditures, Ms. Tong notes that "postage" includes our *Ethics Guide*, and the Seniors Information Card, which is a hot item.

Mr. Hartog asks if the 2007 Carry Forward of $419,669 is in a segregated account. Mr. Orloff responds that it is in the special Sections Fund, which is separate from general State Bar funds.

Confirmation of 2008-9 Calendar. A handout lists the 2008-2009 Tentative Meeting Calendar with meetings in 2008 on September 28 and November 15, and with meetings in 2009 on January 10, February 7, March 14, April 24-26, June 6, July 11 (if needed) and September 13. That is, for her term, Ms. Tong would have 7 scheduled meetings, and one optional meeting. Ms. Tong says she will finalize this meeting schedule in the Fall. She offers to delay the start time of the March 2009 Sacramento meeting. Mr. Sallus says Sacramento has fewer flights, and requests to start at 10 a.m. Additionally, Ms. Tong solicits suggestions for extra curricular activities for her 2009 Retreat in Del Mar.

E. Nominating Committee: Report on TEXCOM appointments [Hartog]

Mr. Hartog says the Board of Governors has approved our new members, as well as our selections for Chair and Vice Chair. Of course, the Chair will be Ms. Tong, and the Vice Chair will be Mr. Horton. New members include: Shannon Burns (Los Angeles), Michael Gerson (Santa Barbara), Patrick Kohlmann (San Jose), Andrew Pharies (San Diego), and Marc Richards (Newport Beach).

Of interest, retiring TEXCOM Advisors, after the September 2008 meeting, are Richard Burger, Barry Fitzpatrick, Catherine Lawson, Ruth Phelps, and Jim MacDonald.

F. Report of Section Administrator [Orloff]
Participation in Annual Meeting Nightclub

Ms. Orloff recalls that last year we contributed $5,000 toward the State Bar annual meeting nightclub event. Obviously supporting a similar contribution in 2008, Chair Stern says he went to the 2007 nightclub event [the infamous "Leopards Lounge"] and it was fun. Because the Section was a sponsor, our TEXCOM members were admitted free. Perhaps a non-party animal, Mr. Burger says he would rather spend the $5,000 to mail out more Senior Information Cards. Chair Stern quickly responds that this is not a zero-sum game. We have already sent out lots of Senior Information Cards. And Mr. Hartog says this is a marketing budget item to maintain good relations with the State Bar. Mr. Sallus piously suggests that some members are in a major economic crunch; a "nightclub" event is no benefit to our members. Chair Stern parried that our members may feel more welcome in attending, knowing that the Section sponsored the event. Mr. Green offers a bedrock comment, "It is helpful and wise to support the State Bar." And Ms. Orloff quickly agrees. Ms. Phelps asks if there is a cover charge. "No." Mr. Horton moves to approve a $5,000 contribution to the annual meeting "nightclub event."

TEXCOM action: Aye – 23; No -1 (Mr. Sallus).

On-Line Section Registration. Ms. Orloff says the State Bar is suggesting that Sections standardize dues at $75 as part of its marketing campaign for the 16 State Bar Sections. Next year, the State Bar will do on-line State Bar registration, and an attorney would simply click to join a Section. Of course, our dues are currently $70.

COMMITTEE, TASK FORCE, AND LIAISON REPORTS

II. LEGISLATION [COREY-REGGIARDO]

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- If you agree to testify, be there unless otherwise notified.

Bills, by Subcommittee:

(1) Trust-Estate Administration

a. AB 171 (Beall) Filing Fees [POTTS]

A handout is Ms. Potts' draft letter to Saul Bercovitch supporting AB 171; it would eliminate the graduated filing fee, and instead establish a single $320 uniform filing fee. AB 171 provides a necessary statutory change in light of *Burkey v. State of California*, 161 Cal. App. 4th 165 (2008), which held that the statutorily created graduated filing fee on estates valued at more than $250,000 was unconditional as a tax on the parties. Mr. Burger moves to support AB 171.

TEXCOM action: Unanimous support.

Mr. Bercovitch says SB 1407 has potential amendments regarding filing fees proposed by the Judicial Council. A handout referencing SB 1407's amendments to various Government Code sections shows increases in existing fees. Ms. Phelps notes the increased fees are to go to the Immediate and Critical Needs Account (ICNA) of State Court Facilities Court Construction Fund. Mr. Green shrugs, saying courts need funds to operate.

b. SB 1421 (Harman-Trust admin-Inc. and Principal) [BURGER]
Recommendation: Support if amended

In obtaining amendments to SB 1421, Mr. Burger reports that he and Ms. Hand were prepared to do a "good cop – bad cop" routine, but as it turned out Ms. Hand did all the work. Ms. Hand nods, saying she worked out some language with the bankers ("CBA"). Occasionally, the

bankers go to court if an estate is illiquid – i.e. having no funds in principal, the bankers seek to spend income to pay expenses. We obviously did not like that approach. Accordingly, we reached a compromise that if all the beneficiaries who are burdened by the action consent, then such action could occur, with no right to reimbursement. And if a minor or incompetent adult were involved, then a guardian must agree.

Mr. Bercovitch injects that the proper position would be "support as proposed to be amended." SB 1421 is set to be heard Tuesday in the Assembly Judiciary Committee but has not been amended to recite this agreed language, which will come later. TEXCOM votes to support SB 1421 as proposed to be amended.

TEXCOM action: Aye – 24; no – 0; abstain – 0.

c. AB 2642 (Niello-Unclaimed Property)
Recommendation: Follow [SCHENONE]

- and -

d. SB 1319 (Machado-Unclaimed Property
Recommendation: Follow [SCHENONE]

AB 2642 and SB 1319, as well as AB 2221, are referenced by Mr. Schenone. Apparently these proposals seek to address a Ninth Circuit opinion and a three year bank inactive account holding period is proposed. Accordingly, a bank holding money must send out a notice that the depositor has not touched the money for 2 ½ years and the depositor should touch it, or the bank will send it to the State. As noted, the recommendation is to follow these proposals.

(2) CLRC:

a. SB 1264 (Harman-Wills and Trusts-NO CONTEST)
Recommendation: SUPPORT IF AMENDED [HORTON]

Mr. Horton says our position on SB 1264 is support if amended to (1) delete provisions for declaratory relief, (2) apply no contest clauses only to beneficiaries who lack probable cause for their pleading, and (3) apply the new law retroactively, subject to the limitations of Probate Code section 3.

Mr. Horton proceeds to tell the harrowing story of how law is made. SB 1264, as it left the Senate, was applicable to documents signed after January 1, 2010. The Assembly Judiciary Committee eliminated declaratory relief and made the proposal effective as of January 1, 2001 – much as we had requested – but we did not get the probable cause exception for the two indirect contests: a forced election and the creditor's claim. Leora Gershenzon [for Assemblyman Jones] views those indirect contests as possibly impacting elder abuse issues. She discouraged us from attending the Committee hearing on Tuesday, saying that if we object to their rewrite of the proposal, then we may not receive our requested elimination of declaratory relief and the January 1, 2001 effective date. She was neither subtle nor discrete about those points.

TEXCOM sensed Mr. Bercovitch smiling, even over the telephone line, in saying that Ms. Gershenzon had given us a strong signal; we could only make things worse if we attend the Committee hearing. He says this proposal has been worked to death. The limited probable cause exception issue is simply not "big picture" enough to grab anyone's attention. However, we could vote today and trust Mr. Bercovitch to hold that position in his pocket, just in case it became possible to advance that position.

Mr. Horton moves to support SB 1264 if amended to include all three of our requests. Mr. Horton observes that the Assembly Judiciary Committee is clear on our position, so we could simply reaffirm our position. Mr. Green asks Mr. Bercovitch whether SB 1264 needs our support to pass out of the Legislature. Mr. Bercovitch reflects momentarily, saying the bill must go back to the Senate to adopt the Assembly amendments. Then he boldly ventures that the bill will "happen" with or without Section support. Mr. Bercovitch speaks with frank clarity. We got quite a lot when the Assembly Judiciary Committee amended SB 1264 to grant two of our three requested amendments, and we should graciously accept what has been given.

Mr. Horton advises TEXCOM that CLRC does not object to these amendments. Mr. Reggiardo asserts that we should keep our position, support if amended. Ms. Lawson observes that, if declaratory relief is repealed, it is retroactive to 2001, and if an instrument is pre-2001, then she asks whether declaratory relief is still available? Mr. Horton says "yes," for a trust irrevocable as of 2001 or a death that occurs before 2001. Surveying the room, Ms. Lawson asks the litigators how many pre-2001 issues exist, she likes the way the statute works now. Ms. Lodise says things are not improving in cases from the Courts of Appeal. Mr. Hartog says the absence of probable cause could be drafted around. Mr. Green does not sense that things are better regarding post-2001 rules. Ms. Phelps simply observes that this is a complex area that we have spent a lot of time exploring. Mr. Horton emphatically concludes that this bill is much better than current law because we would get rid of declaratory relief. And Mr. Green adds that, as proposed, SB 1264 would provide a landscape for future amendments. Mr. Horton repeats his motion to reaffirm our "support if amended" position.

TEXCOM action: Aye – 24; no – 0; abstain – 0.

(3) Estate Planning
a. SB 685 (Yee-Pet Trust) Recommendation: Support [SCHENONE]

Handouts include SB 685, as amended May 27, 2008, and a three-page memo from Chair Stern to TEXCOM re "E-Poll: Approve SB 685 as amended." In short, Chair Stern's memo recites a fluid story of our interactions with the bill's author to shape the proposal. Our working group's emphasis was not on limiting the amount of the gift, but on how the money would be spent. Accordingly, events such as Leona Helmsley's Will could arise. And for an overly generous donation to a pet, the remainder beneficiaries would simply have to wait for the pet's death. However, an applicable rule against perpetuities was included so there would be no "dynasty pet trusts."

The working group observed that TEXCOM's concerns have been met by the January and May amendments to SB 685 and TEXCOM should direct a support letter to Senator Yee. In fact,

Senator Yee specifically asked us to write a letter approving and supporting SB 685 as amended May 27, 2008, in seeking further support to place the measure on the Consent Calendar. Accordingly, Chair Stern took this e-poll: "Does TEXCOM approve SB 685 as amended and authorize sending a support letter to its legislative sponsor?" Mr. Schenone summarizes that the e-poll was conducted, support was obtained, and we wrote the letter that Senator Yee requested.

b. AB 2248 (Spitzer-Formal Will Witness Requirements-Harmless Error)
TEXCOM BILL: Support [REGGIARDO]

Of course this proposal was Mr. Reggiardo's brain child. He proudly announces that, at the Senate Committee hearing, AB 2248 was on the consent calendar. Accordingly, he took a victory lap and left.

c. AB 2452 (Davis-Notaries-Fee and Educational Requirements)
Recommendation: Follow [EHRMAN]

Mr. Ehrman reports that AB 2452 has changed to now include only what kind of identification must be used by a credible witness who is attesting to the identity of a person signing a document.

d. SB 1066 (Migden-Domestic Partnerships) [SCHROFF]
Recommendation: Follow

Ms. Schroff confidently states that SB 1066 will not go anywhere this year.

e. SB 1396 (Cox-Recording Fees) [EHRMAN]
Recommendation: Follow

Mr. Ehrman reports that SB 1396 is still moving and is in the Assembly Judiciary Committee. The proposal would increase an existing $2 recording fee on specified instruments to $3. The proceeds go to the Real Estate Fraud Unit of the District Attorney's office, which must make an annual report regarding expenditure of those funds in addressing real estate fraud.

f. AB 3000 (Wolk-Health Care Decisions) [SCHENONE]

Handouts regarding AB 3000 include a six-page memo to TEXCOM from the "POLST" Work Group dated June 14, 2008, and a Senate Health Committee Analysis for AB 3000 as amended May 22, 2008, with a Committee hearing date of June 11, 2008. AB 3000 would add a new category of instructions to health care providers regarding life sustaining treatment -i.e., the Physician Orders for Life Sustaining Treatment ("POLST"). The Work Group believes that a minor amendment to Probate Code Section 4683 (Scope of Agent's authority) relating to health care powers of attorney would alleviate its concerns regarding the bill. That amendment would clarify that an agent's powers regarding POLST instructions are subject to the same limitations as other agent's powers regarding health care decisions.

Mr. Schenone says that POLST falls in the same category as "do not resuscitate" provisions. At the Retreat, we discussed these proposals. After additional work, the Work Group now has a better understanding of the bill; and the Work Group's most significant concern is that AB 3000 has no link, as noted previously, to Probate Code Section 4683, which governs the agent's scope of authority under a health care power of attorney. It believes Section 4683 should be amended to read:

"Subject to any limitations in the power of attorney health care:

"(a) An agent designated in the power of attorney may make healthcare decisions for the principal, *including those relating to a request regarding resuscitative measures under Section 4780,* to the same extent the principal could make healthcare decisions if the principal had the capacity to do so ...."

Additionally, the memorandum discusses that at page 5, Section 4781.4 would be added to read:

"4781.4. If the orders in a patient's request regarding resuscitative measures directly conflict with the patient's individual healthcare instruction, then, to the extent of the conflict, the most recent order or instruction is effective."

Mr. Schenone observes that this proposed section tries to establish a bright line test, allowing the last document to be effective.

The Senate Health Committee Analysis says that as long as the patient lacks capacity, the healthcare agent would make decisions. The Work Group agrees. Accordingly, we should seek such conforming language in Section 4683.

Ms. Tong wonders if it is too late to make comments. Mr. Bercovitch says that, by the week of June 24th, all bills must be out of policy committees. But Mr. Schenone has been working directly with the sponsor. Accordingly, Mr. Schenone could seek to have our ideas folded into the bill. But, yes, it is too late for a letter.

Chair Stern asks if we should vote to give Mr. Schenone authority to clarify the definitions and make linkages as referenced in the memo.

TEXCOM moves to do so.

TEXCOM action: Aye – 23; no – 0; abstain – 0.

(4) Incapacity

a. SB 1140 (Steinberg-Financial Abuse) [LODISE]

Ms. Lodise says our position on SB 1140 is support if amended; and this bill is moving.

b. SB 1259 (Margett-Crimes against elders and dependent adults) [COREY]

SB 1259 failed to report out of Committee. Accordingly, SB 1259 may be deleted from the agenda.

c. AB 225 (Beall-TROs, elder abuse
Recommendation: Follow [LEE]

Ms. Lee says AB 225 would allow a conservator or guardian to ask for a TRO under the Welfare and Institutions Code regarding elder abuse. Apparently, this bill was amended to address some concerns and is now moving along.

d. AB 2014 (Tran-Out of state property)
TEXCOM bill [TONG]

Ms. Tong says AB 2014 is doing well.

e. SB 1215 (Harman-Professional Fiduciaries)
Recommendation: Support, with
Our amendments (LAWSON, MATULICH, GREEN]

Mr. Green reports that, while we did propose amendments, SB 1215 is dead for this year.

f. SB 483 (Kuehl-Medi-Cal DRA Implementation)
Recommendation: Follow [STERN]

Chair Stern says the Medi-Cal DRA [Deficit Reduction Act] is being implemented in a consumer friendly manner – i.e., the lesser of assessed value or appraised value is to be used to determine equity vlue. The DRA effective date in California will probably be June 2009.

g. [New] AB 250

Chair Stern reports that AB 250 has unexpectedly sprung out of its grave. Mr. Bercovitch adds that the Senate Judiciary Committee has set a hearing for June 24. Perhaps AB 250 is being amended to position it for reintroduction.

(5) Conservatorship Working Group

a. SB 800 (Corbett-Conservatorships-JC Task Force) [LODISE]
Recommendation: OPPOSE UNLESS AMENDED

Ms. Lodise reports that SB 800 is not moving.

(6) Educating Seniors

a. AB 2149 (Berg-Investment Advisors)
Recommendation: Follow **[SALLUS]**

b. AB 2150 (Berg-Sales Designations) **[SALLUS]**

Mr. Sallus says that hearings are set on both AB 2149 and AB 2150 next week. Essentially the bills would set up licensing programs requiring registration for those who say they are expert in dealing with the elderly in estate planning. We support these proposals, and both are moving.

III. ESTATE PLANNING **[MacDONALD]**

A. Formal Will Witness Requirements (see Legislation) [REGGIARDO]

B. Pet Trust Legislation (see Legislation) [SCHENONE]

C. Rule against perpetuities [GAW]

Mr. Gaw says an article is being written for the *Quarterly* involving the rule against perpetuities and that article will likely generate additional discussion.

D. Statutory Power of Attorney – PC 4462(b), 4264(d), 4457(d)-Conformity of powers issues [HOWARD]

Ms. Howard says NCCUSL generated a new proposal for uniform laws involving general powers of attorney. The Committee is comparing NCCUSL's proposal to California law and will report back to TEXCOM on its findings.

E. Anti-Lapse Statutes – Conflict with Intentional Disinheritance – PC 21110, 21111 [EHRMAN]

Mr. Ehrman poses a conundrum - if a person is disinherited, but the instrument's residuary clause fails, then the estate would devolve by intestacy, and the disinherited person could inherit. This riddle is explored in a memorandum which the Committee has posted in its Workroom folder. However, the Committee anticipates having another conference call to explore this topic, and will report to TEXCOM at the next meeting.

F. In Re Marriages [REGGIARDO]

Mr. Reggiardo now addresses the moving target of the state of "marriage" in California. Of course, the California Supreme Court has just decided that gay marriages are okay in California. And, of course, a ballot measure is set for the November election to ban gay marriages in California. Mr. Reggiardo sets the stage for discussion, saying that, if registered domestic partners have the same rights as a married heterosexual couple, then the new California Supreme Court decision should not cause much change. Then Ms. Schroff makes an unsettling comment. A person cannot both be married and have a registered domestic partner.

Ms. Ito says the California Supreme Court decision is too long. However, the theme seems to be that unless a gay couple can be married, they would not have the same respect and dignity as the married heterosexual couple. Mr. Sallus wonders if the high court may be coming from a

different perspective. The majority said that the state has to meet a high standard in order to deny the right for a person to receive a marriage certificate. That is, the state must show a compelling need to deny this right. Additionally, how do we advise a perspective client who says they have a registered domestic partner, and asks whether they should get married? We should study this issue.

In a lighter moment, Mr. Reggiardo wonders if the new high court decision could lead to bigamy – i.e. may a person be a registered domestic partner and then marry someone else. Ms. Hand wonders if we should defer discussion on this topic until after the November election. But throwing ice water into this hot discussion, Mr. Bercovitch reports the views of the Family Law Section. In a conference call yesterday, FLEXCOM concluded that, even if the November ballot measure passes prohibiting gay marriages, the gay marriages that occur in this window period will be valid. Chair Stern caps this meaningful, but meandering, discussion by saying that we will keep it on our agenda

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IV. TRUST – ESTATE ADMINISTRATION [BURGER]

A. Trustee notification issue (PC 16061.7) [BURGER; BAER]

Three handouts guide TEXCOM's discussion on trustee notification: (i) Mr. Burger's capable four page memo to TEXCOM dated 6/9/2008, providing a summary of the legislative proposal and presenting alternative legislative proposals in both A and B versions, (ii) Legislative Proposal – A on which, at the lower right hand corner of the first page, appear the last numbers 42.1, and (iii) Legislative Proposal – B on which, at the lower right hand corner of the first page, appear the last numbers 46.1. As discussed herein, "B" is the same as "A," however "B" is expanded to address additional items raised by the Litigation Committee. In short, Mr. Burger's report references seven items discussed, which impact that proposed legislation:

(1) Clarifying the meaning of "report." See *Esslinger v Cummins* (2006) 144 Cal. App. 4th 517 which the Committee interprets to mean the "report" that the remainder beneficiary was entitled to under section 16061 was coincidentally the same information provided in an "account." The case does not hold that the remainder beneficiary is entitled to receive the same accountings as a current beneficiary. The Committee believes "report" should not be understood to be a thing or noun. Rather, it is a verb and is the trustee's response to a particular beneficiary's request for information relevant to that beneficiary's interest.

(2) Clarify the beneficiary's right to request "terms of the trust."

(3) Settlor may waive accountings, but not the duty to report.

(4) Codify (and redefine) beneficiaries' rights to inspect (and copy) trust books and records. This right is found in *Strauss v Superior Court* (1950) 36 Cal. 2d 396, but has not been codified. The proposal refines the right to inspect records to those books and records, pertaining to the administration of the trust, which contain information relevant to the beneficiary's interests.

(5) Rights to request the trustee to report, to inspect books and records and to request copy of the trust cannot be waived. And of course these rights would be inapplicable when the trust is revocable, or where the trustee and the beneficiary are the same person.

(6) Add rights to 172000 (b) laundry list. The legislative proposal adds to section 17200(b)'s list the beneficiary's right to petition the court to require the trustee to report information, allow inspection of books and records, and provide a copy of the terms of the trust.

(7) Existing law is unclear and illogical with respect to beneficiary's waivers of account. The legislative proposal would clarify that if a beneficiary waives the accounting, it is waived. But if the beneficiary who waived the accounting can show that it is reasonably likely that a material breach has occurred, the beneficiary can ask the court to compel an account.

In Mr. Burger's 6/9/2008 memo, he next contrasts Legislative Proposal-A, and Legislative Proposal – B.

In describing Legislative Proposal – A, Mr. Burger makes the following points:

- *When* should a trustee be required to send the section 16061.7 notification?
- Both types of notification should include right to request copy of the trust.
- *Who* should receive the notice under section 16061.7?
- Who should be authorized to request a copy of the trust?
- What if the notification is late?

Mr. Burger's 6/9/2008 memo next addresses Legislative Proposal – B. As noted the "B" version is the same as "A," except that it also attempts to address deficiencies identified by the Litigation Committee. He notes that those deficiencies would be explained by Mr. Baer. In that regard, Mr. Baer has provided two memorandums which are handouts: (i) memo from Mr. Baer to TEXCOM Litigation Committee dated May 15, 2008 regarding Potential Amendments to Probate Code Section 16061.9, and (ii) a memo from Mr. Baer to TEXCOM Litigation [Committee] members dated May 28, 2008 regarding Clarification of Section 16061.9; Response to James R. Birnberg's Comments.

Returning to Mr. Burger's 6/9/2008 memo to TEXCOM in his description of the B Version, Mr. Burger makes the following points:

- Trustee should be liable for attorney's fees and costs to heirs as well as beneficiaries,
- Before suing trustee, beneficiaries should pursue other remedies.
- When should the trustee not be liable to a beneficiary or heir?
- Can a trustee be liable if no distributions are made during the 120 – day period?
- Should mailing to "last known mailing address" be sufficient?

Mr. Burger comments that Version A is a refined version of prior work and is ready to be reconsidered. Version B, as noted, addresses deficiencies identified by the Litigation Committee. Mr. Burger says that today we have three choices: (1) approve Version A to go to the Board of

Governors to be considered as legislation for this year; (2) approve Version B to go to the Board of Governors for consideration as legislation for this year; or (3) vent more on Version B and consider the matter further.

In discussion, Mr. Burger begins in following the outline of his 6/9/2008 memo. The concept of clarifying the meaning of "report" seems fairly straight forward; "report" is a verb, not a noun.

Legislative Proposal - A

The Summary of Proposal for "A" states as follows:

SUMMARY OF PROPOSAL: This proposal clarifies the identity of the persons entitled to receive a copy of a trust when the trust becomes irrevocable. Secondly, this proposal closes a loophole that may permit the evasion of the required notice of a trust administration under the literal terms of the present statute. Thirdly, this proposal clarifies the identity of the persons entitled to notice of a trust administration upon a change of trustees, the trust becoming irrevocable, or certain other specified circumstances. Fourth, this proposal clarifies that late service of notice is nonetheless effective to commence the running of the statute of limitations to file a contest.

A. In clarifying a beneficiary's right to request "terms of the trust," we should probably conform section 16061.7 with section 16061. Section 16061 seems to limit "terms of the trust" to those items which are "relevant to the beneficiary's interest." In contrast, section 16061.7 allows a beneficiary to request the "terms of the trust" (defined in section 16060.5) pursuant to trustee notification.

B. This proposal closes a loophole that may permit the evasion of the required notice of a trust administration under the literal terms of a present statute.

Probate Code section 16061.7(a) requires notice of trust administration to be provided when a trust becomes irrevocable due to the death of the settlor. However, the literal terms of the statute may not require service of notice upon the death of a settlor who created an ostensibly irrevocable inter vivos trust that retained general power of appointment. This loophole may be used to conceal elder abuse by preventing interested persons from receiving notice, which would give them the opportunity to challenge the trust.

This proposal would require notice of a trust administration to be provided upon a settlor's death if the settlor created an irrevocable trust with a retained power of appointment.

C. This proposal clarifies the identity of the persons entitled to notice of a trust administration upon a change of trustees, the trust becoming irrevocable, or certain other specified circumstances. This proposal would conform restatement of a trust to restatement of a will. For a will, Probate Code section 8110(b) provides that notice of probate administration must be given to "each devisee, executor, and alternate executor named in any will being offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument." This would mean notice must be provided to the person named in the

will being offered for probate and in any codicils thereto, but notice would not be mandated for persons named under prior wills that were revoked in their entirety.

In contrast, for a trust, and at least theoretically, Probate Code section 16061.7(b) could be read to require notice to persons named in a prior version of trust instrument, notwithstanding the fact that the trust was amended and restated in its entirety. Indeed, it may even be read to require notice to persons named under completely unrelated trust instruments. The proposed amendment to Probate Code section 16061.7(b) (1) would make notice requirements in trust administration substantially the same as those in probate administration.

D. This proposal clarifies that late service of notice is nonetheless effective to commence the running of the statute of limitations to file a contest. Probate Code section 16061.8 provides that service of notice "pursuant to this chapter" starts the running of certain deadlines to file a contest. Since the section sets forth a specific time frame for notification, notice that is served late technically does not constitute notice "pursuant to this chapter." Consequently, the statute of limitations may never begin to run when notice is served late. This proposal would provide that a late served notice would prospectively provide protection for the trustee. Specifically, Probate Code section 16061.7(f) requires notice to be served within 60 days of date of death. Probate Codes 16061.8 provides a 120-day deadline to file a contest. The proposed amendment provides the statute of limitations to file a contest of the trust will be triggered by notice severed later than the 60 day period.

Discussion

Chair Stern calls for discussion. TEXCOM has a lengthy discussion, and takes a few votes; but at day's end the legislative proposals are sent back to Committee.

Ms. Lawson notes that Probate Code section 24 (c) defines "beneficiary." This definition involves a class of persons and triggers a legal conclusion regarding who has an interest in that estate. Any amendment to a testamentary instrument will likely cause a change of those who have an interest, and if a person is not in an instrument, an amendment to the instrument or a restatement of the instrument, then the person is omitted and should not receive notice. That is, we would not necessarily want people who are omitted to receive notice of estate administration.

Mr. Gaw observes that a restatement is a new document, not an amendment. Mr. Hartog asks the purpose of the proposal. And Mr. Gaw responds that the purpose is to determine the class of people who are to receive the 120-day notice to contest the trust. (see 16061.8) Perhaps knowingly taking an extreme position, Mr. Hartog says that we should then make the class broad to receive notice – i.e., if beneficiaries in a prior instrument are cut out, then they may wish to contest. Mr. Crickard observes that we are addressing minimum threshold requirements for notice; the trustee can send notice to anyone. Ms. Lawson counters that trustees may send notice to anyone, but they do not do so as a matter of choice (1) to avoid non-entitled persons receiving notice, and (2) to avoid the emotional trauma that notice recipients experience in having received no bequest.

Mr. Baer agrees with Mr. Hartog in giving broad notice. Providing notice lets people know of a particular event. And the need to know may outweigh benefits of not giving notice. But Mr. Jaech agrees with Ms. Lawson. A settlor could draft a new trust and start fresh, without the need to provide notice to beneficiaries of prior instruments; only existing beneficiaries should receive notice. Mr. Matulich observes that this discussion pits the planners against the litigators. If we cut off notice to prior beneficiaries, then they likely will not know of their prior bequests.

Mr. Baer believes that we must protect potential beneficiaries. Theoretically, it may be possible to avoid giving notice to beneficiaries by revoking a trust, but he does not think trusts are commonly revoked because it is simply too much trouble. A more common scenario would be the person who has worked with the same estate planning attorney for 25 years, and then goes to some other attorney to prepare a new testamentary instrument. Those who are beneficiaries under instruments drafted by the first estate planning attorney never know of their prior bequests.

Mr. Ehrman aligns with Mr. Jaech and Ms. Lawson in saying only current beneficiaries should receive notice. Accordingly, if a beneficiary is cut out by a subsequent instrument, they need never know of their prior interest.

Ms. Hand correctly observes the litigators seek broad notice, while the estate planners seek narrow notice. However, as a practical matter, beneficiaries of ancient instruments are difficult to locate. Mr. Crickard says that we must determine the class of people to receive notice, and that class should be current beneficiaries and heirs; not beneficiaries of all prior instruments. With the latter, we are simply too far afield.

Focusing on statutory language, Mr. Horton says section 16061.5 should be consistent with section 16061.7 regarding who receives notice. Without disclosing his intentions, Mr. Sallus – a litigator – moves that we adopt the answer as proposed on page 3 of Mr. Burger's 6/9/2008 memo, which states as follows:

"Who should receive the notice under 16061.7? Trust "beneficiaries" should include those who are beneficiaries under the "terms of the trust," which includes persons named in the trust and all amendments to the trust. A restatement of the trust would be treated as a new trust, and only the beneficiaries under the amendments made after the restatement would be notified."

Ms. Lawson comments that she does not see section 16061.5 and 16061.7 as being inconsistent. Mr. Green observes that, under this position, we would provide notice to people who may have been disinherited. At this point, Chair Stern makes a memorable directive saying "Unanimous votes are not required." TEXCOM votes on the proposed definition of trust beneficiaries.

TEXCOM action: Aye – 5; no – 17; abstain – 4.

At this point, TEXCOM breaks for lunch. In reconvening comments, Chair Stern echoes earlier requests for TEXCOM to focus on carefully crafting legislation in the trustee notification area. Otherwise, he raised the specter of a July meeting. Chair Stern makes another memorable pronouncement in saying "Open your mind and ears, and you will hear."

Refreshed after lunch, Mr. Burger draws focus to the task at hand, in determining who is to receive notice. He says the broad choices are three:

(1) Beneficiaries under the trust and all amendments to the trust;
(2) Those beneficiaries in (1), with a restatement of the trust being treated as a new trust;
(3) The beneficiaries of every version of the trust from the beginning.

He notes that Mr. Sallus' motion was to adopt item (2); however, that motion failed. Mr. Hartog asks Mr. Baer to narrow the description under item (3), in providing notice to beneficiaries under every version of the trust. Generally commenting, Mr. Baer says the class should be larger than just those in the last version. He has great concern particularly about trust amendments and/or restatements close to the settlor's death. Mr. Baer moves that the trustee notify all beneficiaries under the trust as amended and/or restated within five years of the settlor's death – i.e. that notice be given to any person who would have been a beneficiary within five years prior to the settlor's death.

However, Ms. Lodise expresses concern about persons who become incompetent years before their death. And Ms. Howard observes that we may be talking about unrelated beneficiaries. As a planner, she does not wish to expand notice and she fears our receiving a negative reaction from Section members. Ms. Epstein sides with Messrs. Hartog and Baer. The majority of the existing trusts are executed by quite capable settlors; only a few settlors are subject to lack of capacity or undue influence. Additionally, some family members may not be aware of the settlor's estate plan. And it is important to protect their interests. Ms. Lawson observes that, if a restatement clears the slate, then clients would prefer a restatement over an amendment. Mr. Baer cautions against burdening the area with technicalities. He references "Zoomlaw," saying people go to Zoomlaw to make trusts and wills, and it is unlikely that they understand or follow the law. A vote is called on the motion to notify all beneficiaries under a trust as restated or amended within five years prior to the settlor's death.

TEXCOM action: Aye – 7; no – 16.

Perhaps to test the waters, Mr. Burger quickly moves that we simply clarify the law. –i.e., notice be given after the death of the settlor to those persons who are heirs or beneficiaries under the trust as the trust was last amended prior to the settlor's death.

TEXCOM action: Aye – 17; no – 4; abstain – 5.

Sensing momentum, Mr. Burger casts another motion that the trustee provides notification upon change of trustee to the current beneficiaries.

TEXCOM action: Aye – 25; no – 0; abstain – 0.

Chair Stern asks Mr. Burger to now address the next items regarding the proposed legislation. And Mr. Burger, speaking quietly, says the issues are so complex that it may take the whole

summer to resolve them. He yields the floor to Mr. Baer to consider the additional items raised by the Litigation Committee as expressed in Legislative Proposal – B.

As noted, the Summary of Proposal for Legislative Proposal – B includes, but goes beyond, the four topics raised in proposal "A." So the first four topics are omitted.

"Fifth, this proposal clarifies that persons damaged by a trustee's failure to provide the required notice of a trust administration can bring an action against the trustee, that attorney's fees and costs incurred in attempting to recover assets wrongly transferred by the trustee are one of the elements of damages recoverable in such actions, and that the trustee is immune from liability in such actions where he or she has exercised diligence in attempting to comply with the notice requirement. Sixth, the proposal establishes a bright line rule allowing the trustee to withhold distribution of any trust assets until the 120-day statue of limitations under Probate Code section 16061.8 has expired."

Mr. Baer explains that the proposed amendments to section 16061.9 are to clarify both the remedy for those who failed to receive trustee notification, and the trustee's obligations. In an action against the trustee to recover any damages caused by the trustee's failure to comply with Probate Code section 16061.7, attorney's fees and costs reasonably incurred by the petitioner in the course of attempting to recover assets wrongfully transferred to a third person will be recoverable as an element of damages. In contrast, the recovery of attorney's fees in the action against the trustee itself would be governed by the rules generally applicable in breach of trust suits.

Mr. Green ventures that he likes existing 16061.9(a) and Ms. Lee echoes her liking for the existing broad language. Resisting the temptation to respond, Mr. Baer moves on to new proposed subsection 16061.9(b). Unlike section 16061.9(a), section 16061.9(b) does not specifically state that attorney's fees are recoverable in an action brought by an heir who the trustee has not served with the section 16061.7 notification. This proposal would provide that in an action against the trustee to recover any damages caused by the trustee's failure to comply with Probate Code section 16061.7, attorney's fees and costs reasonably incurred by the petitioner in the course of attempting to recover trust assets wrongfully transferred to a third person shall be recoverable as an element of damages.

Additionally, section 16061.9(b) currently defines a "reasonably diligent effort" to comply with section 16061.7 as mailing the statutory notice "to the heir at the heir's last mailing address *actually known to the trustee.*" (Emphasis added.) Under this proposal, the trustee's exercise of reasonable diligence in determining the identity and mailing address of the beneficiary or heir will constitute a complete defense to an action against the trustee brought by a beneficiary or heir who has not received a section 16061.7 notification. For example, if the trustee mails the section 16061.7 notification to an heir, but the notification is returned in the mail stamped "unknown at this address," the trustee must exercise reasonable diligence in determining the heir's current address to be entitled to the immunity under these proposed revisions.

Section 16061.9(c) currently authorizes the trustee to "consider" the fact that the statute of limitations for a trust contest has not expired in determining the timing and distribution of trust

assets. This language provides the trustee with little guidance or protection. Under the proposal, the trustee can decline to make any distribution of principal or income until the 120-day statute of limitations expires. This provides a bright line rule to protect trustees from being pressured to make distribution without knowing whether a trust contest might be filed. Of course, surviving spouses will still be entitled to distributions under the survivor's trust, which remains revocable.

Mr. Crickard wonders if these proposals would allow people to serve late notices, allowing a corresponding late 120-day statutory limitations. Ms. Lawson likes new proposed subsection 16061.9(c), saying these trustee protections are useful. Ms. Lodise scans the room. She seems to sense that a large number of comments are imminent on these proposals. And she says "Send it back to Committee." Chair Stern quickly notes the number of unaddressed items on the agenda and acquiesces, returning to the agenda.

b. Accounts & Reports [GAW, LAWSON]

A handout is a legislative proposal addressing "Aspects of the Duty of a Trustee to Inform Beneficiaries Concerning Trust Administration." In summary, this proposal would clarify and some in some cases expand a trustee's obligation to provide the trust beneficiaries with information and documents concerning trust administration. Under current law, the extent of a beneficiary's right to obtain information from a trustee is not clear, causing disputes to arise, which may be resolved in section 17200 petitions. As noted, this proposal would reduce the number of disputes. The proposal has already been considered by TEXCOM a couple of times. (See May 2008 Minutes at pages 35-36.) Ms. Lawson promptly moves to approve the legislative proposal.

Ms. Ito, siding with the typically harried trustee, asks if we could avoid blanket waivers, and narrow waivers to specified information. As an example, Ms. Ito references proposed section 16068 which provides,

"Any waiver by a settlor of the obligation of the trustee to provide the terms of the trust to the beneficiary as required by Section 16060.7, to report requested information to the beneficiary as required by Section 16061, or to make available books, documents and records to the beneficiary as required by Section 16065 is against public policy and shall be void."

Ms. Ito asks if a settlor may narrow what a beneficiary could request. After all, it is the settlor's property. She asks TEXCOM to mentally image the multitude of beneficiaries who harass trustees. Mr. Hartog quickly quips that, after the settlor's death, it is no longer her property. And Ms. Epstein adds that many times trusts are created to protect an incompetent person who, by nature, may be demanding. TEXCOM discussion continues. Then Ms. Lawson skillfully interjects that she has made a motion to approve this legislative proposal, and she calls for a vote.

TEXCOM action: Aye – 21; no – 2; abstain – 0.

Mr. Bercovitch says the Office of Governmental Affairs needs the project documents by August 1, 2008. He reminds TEXCOM that we are writing for three to four audiences, including the Board of Governors, non-attorneys, legislative authors, and legislative committee staff.

C. Section 16350; Hasso v. Hasso – n.r. [SCHENONE]
D. 15400 et seq.: Trust reformation project and Related matters – n.r. [Reggiardo]

V. ETHICS [LODISE]
A. RRC: Status of rule reform

Ms. Lodise reminds TEXCOM that, at the Retreat, an off-agenda item and handout included a Discussion Draft of Proposed Amendments to Rules of Professional Conduct. And specifically, we discussed Rule 1.7 Conflicts of Interests: Current Clients [3-310]. Ms. Lodise provides a letter to the Rules Revision Commission giving Public Comment to Proposed New Rule 1.7 (former 3-310). She states that proposed Rule 1.7 would require firm disqualification where an attorney represents a client in a matter directly adverse to another client, without tying the disqualification to the possession of confidential information relevant to the new matter. The Trusts and Estates Section believes this change to the rule potentially severely impacts estate planners whose estate planning work may place their firms in a conflict position, without having any information which is confidential or material to the new representation. The old rule, which allowed a showing that no material confidential information was obtained, created a bright line test that could be more easily followed. TEXCOM votes on sending Ms. Lodise's letter to RRC.

TEXCOM action: Aye – 23; no – 0.

VI. ELECTIVE ADMINISTRATION OF TRUSTS AND ESTATES [BURGER/HARTOG] – n.r.

VII. CONFERENCE OF DELEGATES – n.r. **[HENDEN]**

VII. EDUCATING SENIORS – n.r. **[SALLUS]**

IX. CLRC [HORTON]
A. Restrictions on donative transfers-Report on CLRC meeting

Handouts include CLRC memorandum 2008-21: Donative Transfer Restrictions, which is six-pages, plus a two-page letter from Mr. Birnberg addressing "care custodians," as well as a 32-page Staff Draft Tentative Recommendation (May 14, 2008) regarding Donative Transfer Restrictions. The Proposed Legislation begins at page 19, beginning with Definitions. And proposed section 21362 defines "care custodian" as follows:

"Section 21362. (a) "Care Custodian" means a person who provides health or social services to a dependant adult for compensation, as a profession or occupation. The compensation need not be paid by the dependant adult."

"(b) For the purposes of this section, "health and social services" include, but are not limited to, the administering of medicine, medical testing, wound care, housekeeping, shopping, cooking, transportation, assistance with hygiene, and assistance with finances."

"Comment. Section 21362 is similar to the last sentence of former section 21350(c), except that the definition of "care custodian" is now limited to a person who provides services for compensation, as a profession or occupation."

As quoted above, "care custodian" means a person "... who provides health or social services ...." After a brief discussion, Mr. Horton moves to exclude persons who are paid for "social services" from the definition; that is, he would seek to limit the definition to "health services." Mr. Green notes that it is a difficult line to draw.

TEXCOM action: Aye – 9; no – 14.

Mr. Horton promptly proceeds to subsection (b), quoted above, and moves to exclude the following items from the definition: housekeeping, shopping, cooking, transportation, and assistance with finances [i.e. book keeper, tax return preparer, broker, etc.] Ms. Lodise asks why we would exclude those who provide "assistance with finances." Chair Stern nods, saying that "assistance with finances" has too many possible situations; we should retain it. Mr. Sallus cheerfully agrees, saying brokers both churn accounts and obtain gifts. Knowing how to achieve his objectives piecemeal, Mr. Horton promptly narrows his motion to exclude "assistance with finances" from subsection (b).

TEXCOM action: Aye – 10; no – 14.

Mr. Horton next moves to exclude housekeeping, shopping, and cooking.

TEXCOM action: Aye – 6; no – 14.

Mr. Horton now moves to exclude transportation, and hits pay dirt.

TEXCOM action: Aye – 11; no – 9.

Mr. Horton next skips to page 21 and section 21380. "Presumption of fraud or undue influence." Mr. Horton notes that subsection 21380(a) (3) involves the care custodian, but only if the donative instrument was executed during the period in which the care custodian provided services to the transferor; additionally, subsection (b) allows the presumption to be rebutted by a preponderance of the evidence and, turning to subsection (c), if the beneficiary does not rebut the presumption, then the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.

Continuing, Mr. Horton references proposed section 21382 which lists exceptions to the presumption of fraud or undue influence, including (e) a transfer of $5,000 or less [de minimus exception]. Mr. Birnberg suggests that the de minimus exception should be up to $5,000 or an unstated percentage of the estate value. Mr. Horton says the CLRC does not adopt

Mr. Birnberg's proposal, but asks for some direction. Mr. Green envisions a disqualified person preying on Bill Gates. But avoiding distraction, Mr. Horton moves to approve a de minimus exception that includes an unstated percentage of the estate.

TEXCOM action: Aye – 12; no – 6.

Mr. Horton next points to page 23 and section 21384 "attorney certification." He notes that subsection (c) adopts our language that "An attorney who drafts a donative instrument can review and certify the same instrument pursuant to this section, but only as to a gift to a care custodian."

Mr. Horton refers at page 23 to the proposed section 21388 "Liability of third party transferor" creating the possibility for liability if the person transferring the property has actual notice, prior to transferring the property, that the donative instrument is subject to the presumption created under this part.

Mr. Horton next addresses proposed section 21392 "Commencement of action." Mr. Horton observes the statute of limitations under current law for a will is 120-days or, if no will exists, then three years. The CLRC almost decided to eliminate the standard three year statute of limitations. However, Mr. Horton thought that was a bad idea. Of course, for trusts, there is no special statute of limitations. Mr. Horton moves that we have a special statue of limitations for trusts of 120-days if notice is given, that we retain the 120-day statute for wills, and that the other transfers be subject to a three year statute of limitations.

TEXCOM action: Aye – 20; no – 0.

Mr. Horton says that some time before August 2008, the CLRC will provide a recommendation on this topic, which he will post. He urges TEXCOM to talk with our colleagues-there will be controversy. And by history, CLRC will remove items involving substantial controversy.

B. Attorney-client privilege after death – Status – n.r.
C. No Contest Clause – see SB 1264, pp. 5-6, supra.

X. CEB – n.r. **[GOOD]**

XI. QUARTERLY – n.r. **[HAYES]**

XII. EDUCATION – n.r. **[ITO]**

XIII. LITIGATION – n.r. **[ZABRONSKY]**

XIV. MEMBERSHIP AND MARKETING - n.r. **[LAWSON]**

XV. NCCUSL – n.r. **[FITZPATRICK]**

XVI. INCAPACITY COMMITTEE – n.r. **[LODISE]**

XVII. CONSRVATORSHIP WORKING GROUP – n.r. **[COREY]**

XVIII. INCOME/TRANSFER TAX - n.r. **[JAECH]**

XIX. TECHNOLOGY – n.r. **[GAW]**

XX. NEW BUSINESS – n.r.

XXI. COMING ATTRACTIONS

NEXT TEXCOM MEETING
July 19, 2008

Leonard W. Pollard II (Reporter)

State Bar of California
Travel and Business Expense
Reimbursement Allowance Information
In Effect as of July 1, 2008

REIMBURSEMENT POLICY

DEADLINES: All travelers must submit an approved expense report to their State Bar Staff Liaison ***within 30 calendar days*** of completion of their travel. Original receipts for lodging, taxi, air travel, car rentals and any expenses of $25.00 or more must be attached; the form must be signed.

FLIGHTS: If you can obtain a flight for $250 or less, your flight will be reimbursed. If you cannot obtain a flight for $250 or less, you must complete the Giselle Travel Profile Form. FAX it to Cheryl Morgan at 415-538-2368. After 24 hours, contact Giselle Travel at 1-800-523-0100 and have them book your flight. (You may also do this with them online by going to www.globaltrav.com. The cost of your flight will be direct billed to the State Bar.

MILEAGE: If you are driving, you will be reimbursed for up to the comparable cost of a flight between the originating and destination cities. Specifically, if you are driving between cities that have airports, find out what the most economical airfare would be. (The easiest way to do this is by going to Travelocity, Orbitz, or a similar travel site.) Print out the page indicating what the airfare would be on the proposed date of travel. If you choose to drive you will be reimbursed up to that amount for mileage. Be sure to attach this page to your reimbursement request.

Example: If you drive from LA to Oakland @ 800 miles (accruing up to $465 in mileage reimbursement), and document via a website print-out that the most economical airfare would have been $245 --- you will be reimbursed @ $245.

LODGING
(Excluding all taxes)

San Francisco	$205.00
Los Angeles	$130.00
San Diego	$150.00
Sacramento	$150.00
All other areas	$150.00

Note: If your Section has a contracted rate at a hotel or resort for a Section function, you can be reimbursed at that special rate.

MEALS

Breakfast	$ 6.00
Lunch	$10.00
Dinner	$18.00

MILEAGE 58.5¢ per mile

Senate Bill No. 685

Passed the Senate July 2, 2008

_____

Secretary of the Senate

Passed the Assembly June 26, 2008

_____

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day of _____, 2008, at _____ o'clock ____M.

_____

Private Secretary of the Governor

CHAPTER _____

An act to repeal and add Section 15212 of the Probate Code, relating to pet trusts.

LEGISLATIVE COUNSEL'S DIGEST

SB 685, Yee. Pet trusts.

Existing law provides that a trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration.

This bill would repeal the provisions regarding domestic or pet animal trusts and would provide instead that a trust for the care of a domestic or pet animal is for a lawful noncharitable purpose and terminates when no animal is living on the date of the settlor's death, unless otherwise provided in the trust. The bill would require a court to liberally construe an animal trust to bring it within the bill's provisions, to presume against an interpretation that would render the disposition a mere request or an attempt to honor the animal, and to carry out the general intent of the trust. The bill would provide an order of disposition of trust property upon termination of the trust and would provide authority for the court to name a trustee and to transfer trust property, as specified. This bill would permit any person interested in the welfare of the animal or any nonprofit charitable organization that has as its principal activity the care of animals to petition the court regarding the trust, as specified. The bill would provide a process for an accounting of the trust, to be waived if the value of the trust assets does not exceed $40,000, as specified. The bill would permit beneficiaries of the trust, a person designated by the trust, or certain nonprofit charitable organizations, upon reasonable request, to inspect the animal, the premises where the animal is maintained, or the books and records of the trust. The bill would except these trusts from the application of specified provisions generally regarding the termination of trusts.

The people of the State of California do enact as follows:

SECTION 1. Section 15212 of the Probate Code is repealed.

SEC. 2. Section 15212 is added to the Probate Code, to read:

15212. (a) Subject to the requirements of this section, a trust for the care of an animal is a trust for a lawful noncharitable purpose. Unless expressly provided in the trust, the trust terminates when no animal living on the date of the settlor's death remains alive. The governing instrument of the animal trust shall be liberally construed to bring the trust within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor. Extrinsic evidence is admissible in determining the settlor's intent.

(b) A trust for the care of an animal is subject to the following requirements:

(1) Except as expressly provided otherwise in the trust instrument, the principal or income shall not be converted to the use of the trustee or to any use other than for the benefit of the animal.

(2) Upon termination of the trust, the trustee shall distribute the unexpended trust property in the following order:

(A) As directed in the trust instrument.

(B) If the trust was created in a nonresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will.

(C) If the application of subparagraph (A) or (B) does not result in distribution of unexpended trust property, to the settlor's heirs under Section 21114.

(3) For the purposes of Section 21110, the residuary clause described in subparagraph (B) of paragraph (2) shall be treated as creating a future interest under the terms of a trust.

(c) The intended use of the principal or income may be enforced by a person designated for that purpose in the trust instrument or, if none is designated, by a person appointed by a court. In addition to a person identified in subdivision (a) of Section 17200, any person interested in the welfare of the animal or any nonprofit charitable organization that has as its principal activity the care of animals may petition the court regarding the trust as provided in Chapter 3 (commencing with Section 17200) of Part 5.

(d) If a trustee is not designated or no designated or successor trustee is willing or able to serve, a court shall name a trustee. A court may order the transfer of the trust property to a court-appointed trustee, if it is required to ensure that the intended use is carried out and if a successor trustee is not designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. A court may also make all other orders and determinations as it shall deem advisable to carry out the intent of the settlor and the purpose of this section.

(e) The accountings required by Section 16062 shall be provided to the beneficiaries who would be entitled to distribution if the animal were then deceased and to any nonprofit charitable corporation that has as its principal activity the care of animals and that has requested these accountings in writing. However, if the value of the assets in the trust does not exceed forty thousand dollars ($40,000), no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee is required by reason of the existence of the fiduciary relationship of the trustee, unless ordered by the court or required by the trust instrument.

(f) Any beneficiary, any person designated by the trust instrument or the court to enforce the trust, or any nonprofit charitable corporation that has as its principal activity the care of animals may, upon reasonable request, inspect the animal, the premises where the animal is maintained, or the books and records of the trust.

(g) A trust governed by this section is not subject to termination pursuant to subdivision (b) of Section 15408.

(h) Section 15211 does not apply to a trust governed by this section.

(i) For purposes of this section, "animal" means a domestic or pet animal for the benefit of which a trust has been established.

Approved _____, 2008

_____

Governor

AMENDED IN SENATE JULY 2, 2008

AMENDED IN SENATE JUNE 19, 2008

AMENDED IN SENATE MAY 20, 2008

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL No. 3000

Introduced by Assembly Member Wolk
(Principal coauthor: Assembly Member Berg)
(~~Coauthor: Assembly Member Huffman~~ *Coauthors: Assembly Members Huffman and Krekorian*)
(Coauthor: Senator Kuehl)

February 22, 2008

An act to amend Sections 4780, 4782, 4783, 4784, and 4785 of, to amend the heading of Part 4 (commencing with Section 4780) of Division 4.7 of, and to add Sections 4781.2, 4781.4, and 4781.5 to, the Probate Code, relating to health care decisions.

LEGISLATIVE COUNSEL'S DIGEST

AB 3000, as amended, Wolk. Health care decisions: life-sustaining treatment.

Existing law defines a "request to forgo resuscitative measures" as a written document, signed by an individual, or a legally recognized surrogate health care decisionmaker, and a physician, that directs a health care provider to forgo resuscitative measures for the individual. Existing law provides that a health care provider who honors a request to forgo resuscitative measures is not subject to criminal prosecution, civil liability, discipline for unprofessional conduct, administrative sanction, or any other sanction, as a result of his or her reliance on the request, provided that he or she meets certain requirements.

This bill would *make findings and declarations regarding health care planning. The bill would* redefine a request to forgo resuscitative measures as a "request regarding resuscitative measures," which would be a written document, signed by an individual *with capacity*, or a legally recognized health care decisionmaker, and ~~a~~ *that individual's* physician, that directs a health care provider regarding resuscitative measures. The bill would include within this definition a Physician Orders for Life Sustaining Treatment *(POLST)* form, as specified. The bill would authorize a legally recognized health care decisionmaker to execute the ~~Physician Orders for Life Sustaining Treatment~~ *POLST* form only if the individual lacks capacity, or the individual has designated that the decisionmaker's authority is effective, and would require a health care provider to explain the form, as specified. *The bill would allow an individual having capacity to revoke a POLST form, as specified.* The bill would require a health care provider to treat an individual in accordance with a ~~Physician Orders for Life Sustaining Treatment~~ *POLST* form, except as specified, and would permit a physician to conduct an evaluation of the individual and issue a new order consistent with the most current information available about the individual's health status and goals of care. The bill would require the legally recognized health care decisionmaker of an individual without capacity to consult with the individual's treating physician prior to making a request to modify that individual's ~~Physician Orders for Life Sustaining Treatment~~ *POLST* form, and would provide that an individual with capacity may at any time request alternative treatment to that treatment that was ordered on the form. The bill would provide that if the orders in ~~a patient's~~ *an individual's* request regarding resuscitative measures directly conflict with ~~the patient's~~ *his or her* individual health care instruction, the most recent order or instruction is effective. The bill would also make conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares all of the following:

(a) It is important for people to make health care decisions before it is necessary.

(b) Health care planning is a process, rather than a single decision, that helps individuals think about the kind of care they would want if they become seriously ill or incapacitated, and encourages them to talk with their loved ones and physicians.

(c) Advance directives give individuals the ability to put their wishes in writing and to identify the person who would speak for them should they become unable to speak for themselves.

(d) The Physician Orders for Life Sustaining Treatment (POLST) form complements an advance directive by taking the individual's wishes regarding life-sustaining treatment, such as those set forth in the advance directive, and converting those wishes into a medical order.

(e) The hallmarks of a POLST form are (1) immediately actionable, signed medical orders on a standardized form, (2) orders that address a range of life-sustaining interventions as well as the patient's preferred intensity of treatment for each intervention, (3) a brightly colored, clearly identifiable form, and (4) a form that is recognized, adopted, and honored across treatment settings.

(f) A POLST is particularly useful for individuals who are frail and elderly or who have a compromised medical condition, a prognosis of one year of life, or a terminal illness.

~~SECTION 1.~~

SEC. 2. The heading of Part 4 (commencing with Section 4780) of Division 4.7 of the Probate Code is amended to read:

PART 4. REQUEST REGARDING RESUSCITATIVE MEASURES

~~SEC. 2.~~

SEC. 3. Section 4780 of the Probate Code is amended to read:

4780. (a) As used in this part:

(1) "Request regarding resuscitative measures" means a written document, signed by (A) an individual *with capacity*, or a legally recognized health care decisionmaker, and (B) ~~a~~ *the individual's* physician, that directs a health care provider regarding resuscitative measures. A request regarding resuscitative measures is not an ~~advanced~~ *advance* health care directive.

(2) "Request regarding resuscitative measures" includes one, or both of, the following:

(A) A prehospital "do not resuscitate" form as developed by the Emergency Medical Services Authority or other substantially similar form.

(B) A Physician Orders for Life Sustaining Treatment form, as approved by the Emergency Medical Services Authority.

(3) "Physician Orders for Life Sustaining Treatment form" means a request regarding resuscitative measures that directs a health care provider regarding resuscitative and life-sustaining measures.

(b) A legally recognized health care decisionmaker may execute the Physician Orders for Life Sustaining Treatment form only if the individual lacks capacity, or the individual has designated that the decisionmaker's authority is effective pursuant to Section 4682.

(c) The Physician Orders for Life Sustaining Treatment form and medical intervention and procedures offered by the form shall be explained by a health care provider, as defined in Section 4621. The form shall be completed by a health care provider based on patient preferences and medical indications, and signed by a physician *and the patient or his or her legally recognized health care decisionmaker. The health care provider, during the process of completing the Physician Orders for Life Sustaining Treatment form, should inform the patient about the difference between an advance health care directive and the Physician Orders for Life Sustaining Treatment form.*

(d) An individual having capacity may revoke a Physician Orders for Life Sustaining Treatment form at any time and in any manner that communicates an intent to revoke, consistent with Section 4695.

~~(d)~~

(e) A request regarding resuscitative measures may also be evidenced by a medallion engraved with the words "do not resuscitate" or the letters "DNR," a patient identification number, and a 24-hour toll-free telephone number, issued by a person pursuant to an agreement with the Emergency Medical Services Authority.

~~SEC. 3.~~

SEC. 4. Section 4781.2 is added to the Probate Code, to read:

4781.2. (a) A health care provider shall treat an individual in accordance with a Physician Orders for Life Sustaining Treatment form.

(b) Subdivision (a) does not apply if the Physician Orders for Life Sustaining Treatment form requires medically ineffective health care or health care contrary to generally accepted health care standards applicable to the health care provider or institution.

(c) A physician may conduct an evaluation of the individual and, if possible, in consultation with the individual, or the individual's legally recognized health care decisionmaker, issue a new order consistent with the most current information available about the individual's health status and goals of care.

(d) The legally recognized health care decisionmaker of an individual without capacity shall consult with the *physician who is, at that time, the* individual's treating physician prior to making a request to modify that individual's Physician Orders for Life Sustaining Treatment form.

(e) An individual with capacity may, at any time, request alternative treatment to that treatment that was ordered on the form.

~~SEC. 4.~~

SEC. 5. Section 4781.4 is added to the Probate Code, to read:

4781.4. If the orders in ~~a patient's~~ *an individual's* request regarding resuscitative measures directly conflict with ~~the patient's~~ *his or her* individual health care instruction, as defined in Section 4623, then, to the extent of the conflict, the most recent order or instruction is effective.

~~SEC. 5.~~

SEC. 6. Section 4781.5 is added to the Probate Code, to read:

4781.5. The legally recognized health care decisionmaker shall make health care decisions pursuant to this part in accordance with Sections 4684 and 4714.

~~SEC. 6.~~

SEC. 7. Section 4782 of the Probate Code is amended to read:

4782. A health care provider who honors a request regarding resuscitative measures is not subject to criminal prosecution, civil liability, discipline for unprofessional conduct, administrative sanction, or any other sanction, as a result of his or her reliance on the request, if the health care provider (a) believes in good faith that the action or decision is consistent with this part, and (b) has no knowledge that the action or decision would be inconsistent with a health care decision that the individual signing the request would have made on his or her own behalf under like circumstances.

~~SEC. 7.~~

SEC. 8. Section 4783 of the Probate Code is amended to read:

4783. (a) Forms for requests regarding resuscitative measures printed after January 1, 1995, shall contain the following: "By signing this form, the legally recognized health care decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form."

(b) A printed form substantially similar to that described in subparagraph (A) of paragraph (2) of subdivision (a) of Section 4780 is valid and enforceable if all of the following conditions are met:

(1) The form is signed by the individual, or the individual's legally recognized health care decisionmaker, and a physician.

(2) The form directs health care providers regarding resuscitative measures.

(3) The form contains all other information required by this section.

~~SEC. 8.~~

SEC. 9. Section 4784 of the Probate Code is amended to read:

4784. In the absence of knowledge to the contrary, a health care provider may presume that a request regarding resuscitative measures is valid and unrevoked.

~~SEC. 9.~~

SEC. 10. Section 4785 of the Probate Code is amended to read:

4785. This part applies regardless of whether the individual executing a request regarding resuscitative measures is within or outside a hospital or other health care institution.

CORRECTIONS:

Text—Pages 4 and 5.

O

BILL NUMBER: SB 1264 ENROLLED
BILL TEXT

PASSED THE SENATE JULY 2, 2008
PASSED THE ASSEMBLY JUNE 23, 2008
AMENDED IN ASSEMBLY JUNE 18, 2008
AMENDED IN SENATE APRIL 15, 2008
AMENDED IN SENATE MARCH 24, 2008

INTRODUCED BY Senator Harman

FEBRUARY 19, 2008

An act to add Part 3 (commencing with Section 21310) to Division 11 of, and to repeal Part 3 (commencing with Section 21300) of Division 11 of, the Probate Code, relating to wills and trusts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1264, Harman. Wills and trusts: no contest clauses.

Existing law, in relation to wills, trusts, and other instruments, defines and regulates no contest clauses, which are provisions in otherwise valid instruments that, if enforced, penalize beneficiaries if the beneficiaries file a contest with the court. Existing law provides that a no contest clause in a will or a trust is generally enforceable and defines a "contest" and "direct contest" in this regard. Existing law provides that certain actions do not constitute a contest unless expressly identified in the no contest clause as a violation. Existing law exempts certain contests from the enforcement of the no contest clause under specified circumstances, including if there is reasonable cause to believe that instrument has been revoked. Existing law permits a beneficiary to apply to a court for a determination of whether a particular motion, petition, or other act by the beneficiary would be a contest within the terms of a no contest clause.

This bill, beginning January 1, 2010, would revise, recast, and clarify these provisions. The bill would limit the application of a no contest clause to specific contests. The bill would redefine "direct contest," and would provide that a no contest clause may be enforced against a direct contest only when it is brought without probable cause, which the bill would define for these purposes. The bill would delete the provisions regarding the authority of a beneficiary to apply to a court for a determination regarding a no contest clause, as described above.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Part 3 (commencing with Section 21300) of Division 11 of the Probate Code is repealed.

SEC. 2. Part 3 (commencing with Section 21310) is added to Division 11 of the Probate Code, to read:

PART 3. No Contest Clause

21310. As used in this part:

(a) "Contest" means a pleading filed with the court by a

beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) "Direct contest" means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

(1) Forgery.

(2) Lack of due execution.

(3) Lack of capacity.

(4) Menace, duress, fraud, or undue influence.

(5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(6) Disqualification of a beneficiary under Section 6112 or 21350.

(c) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) "Pleading" means a petition, complaint, cross-complaint, objection, answer, response, or claim.

(e) "Protected instrument" means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

21311. (a) A no contest clause shall only be enforced against the following types of contests:

(1) A direct contest that is brought without probable cause.

(2) A pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

(3) The filing of a creditor's claim or prosecution of an action based on it. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.

(b) For the purposes of this section, probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.

21312. In determining the intent of the transferor, a no contest clause shall be strictly construed.

21313. This part is not intended as a complete codification of the law governing enforcement of a no contest clause. The common law governs enforcement of a no contest clause to the extent this part does not apply.

21314. This part applies notwithstanding a contrary provision in the instrument.

21315. (a) This part applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001.

(b) This part does not apply to an instrument that became irrevocable before January 1, 2001.

SEC. 3. This act shall become operative on January 1, 2010.

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Conference of Delegates of California Bar Associations

Serving Justice By Improving the Law

2008 Resolutions

Rescom Recommendations

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01-02-2008	CDCBA Rules: Legislative Policy Resolutions
01-03-2008	State Bar Records: Option Not to Publish Retired Judges' Addresses
01-04-2008	CDCBA Rules: Response to Requests for Position on Legislation
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4-01-08	Restriction of Joint Tenancies to Natural Persons	Disapprove	**Approve**
4-02-08	Probate/Civil Procedure: Jurisdiction for Elder Abuse Actions	Disapprove	Disapprove
4-03-08	Termination of Deposit of Estate Planning Documents	Approve in Principal	**Disapprove**
4-04-08	Probate Standard of Proof to Prove Felonious Death	Disapprove	**Approve**
4-05-08	Probate: Appointment of Temporary Trustee During Appeal of Probate Order	Approve in Principal	Approve

TO: Saul Bercovitch

RE: Project No. Appointment of Counsel for a Proposed Conservatee who may lack the capacity to hire counsel

Section/Committee and Contact

Section/Committee: Trusts and Estates Section
Date of Approval (before first introduction in the Legislature as AB 1491 in 1997): 5/31/97
[Approved again by the Incapacity Committee on 1/3/2001; amended 11/4/01 and approved by Incapacity Committee 1/7/02 ; approved by Executive Committee 1/12/02; approved by Incapacity Committee 6/2/08, 7/7/08;)
Author: Incapacity Committee,
Trusts and Estates Section, State Bar of California
C/o Margaret G. Lodise
Sacks, Glazier, Franklin & Lodise LLP
350 S. Grand Ave., Suite 3500
Los Angeles CA 90071
Principal Contact: Margaret G. Lodise

Digest:

The existing statutory law concerning the appointment of an attorney by the court for a proposed conservatee who appears with a lawyer who contends that he or she is the proposed conservatee's lawyer, is unclear. Probate Code §§ 1470 and 1471 provide statutory authorization for the court to appoint an attorney to represent a proposed conservatee when the conservatee lacks counsel to represent himself or herself if the court determines that the appointment is necessary or would be helpful to the resolution of the matter. Neither code section addresses a situation where a lawyer contends that he or she represents a proposed conservatee, but the court has serious doubts about whether the proposed conservatee has the capacity to hire the would-be attorney as the proposed conservatee's attorney in the pending proceeding or as to the potential conflicts of interest of the attorney.

As more and more conservatorships are contested, the issue of whether the lawyer appearing for the conservatee really represents the conservatee's interests, or was hired by a competent conservatee, has become increasingly important. In

Conservatorship of Chilton, 8 Cal.App.3d 34, 86 Cal. Rptr. 860 (Second Dist. 1970) the appellate court found that the lawyer appearing "for" the proposed conservatee, to oppose a conservatorship, could be acting *in reality* for the perpetrator *against* the best interests of the manipulated and incompetent proposed conservatee.

The case of Sullivan v. Dunn 198 Cal. 183, 244 p. 343 (1926) indicates that the mere fact that a lawyer shows up and alleges that he or she represents the proposed conservatee does not mean that the proposed conservatee has the capacity to hire the lawyer. It is obvious that a party who cannot exercise any power or waive any right, and who lacks the capacity to contract (Civil Code § 40), cannot prosecute or dismiss an appeal or action on his own.

More recently, in Conservatorship of David L. (2008) WL , the court found that, where counsel was appointed, the conservatee was entitled to effective assistance of counsel and to address the court as to conservatee's reasons for changing counsel. In so finding, the court addressed the due process rights of a conservatee to effective counsel.

In the criminal context, the court *can* appoint an additional attorney to represent a person where the Court has serious doubts about that person's competence. People v. Stanley 10 Cal. 4th 764, 806-807; 42 Cal. Rptr. 2d 543, 897 P. 2d 481 (1995). In People v. Stanley, the defendant later contended that he was competent, and so the trial court appointed an additional attorney at a competency hearing to represent defendant's personal point of view that he was competent.

However, the importance of protecting a proposed conservatee from overreaching by an attorney not truly independent must be weighed against the potential invasion of the proposed conservatee's rights to privileged communications with counsel representing the conservatee. In some courts, court appointed counsel is treated as a guardian ad litem or an Evidence Code Section 730 expert. If the court is to have the absolute right to appoint counsel for the proposed conservatee, it is equally important that the appointed counsel be obligated to represent only the proposed conservatee and not any other interest.

This proposed legislation and accompanying rule of court offers the court the ability to appoint counsel even where it appears that other counsel is already representing the conservatee. In so doing, it enables the court to protect against a conservatee who might not have had the capacity to contract in hiring an attorney and to provide a neutral attorney to consider the wishes of the conservatee where

undue influence or abuse may be present. The proposed bill merely would allow the court to appoint an attorney for the proposed conservatee, despite the fact that another member of the bar shows us and says s/he is the proposed conservatee's lawyer and the proposed conservatee says that that is true.

The proposed legislation does **not** address what the court appointed lawyer's duties would be. However, the Section recommends that the proposal be accompanied by a change to the rules of court to specifically state the duties of the court appointed counsel solely to the proposed conservatee. The proposed text of the rule of court, modified from an existing LASC Rule of Court is set forth below the proposed legislative change.

Application: ***How will this bill remedy the problem or deficiency in existing law?***

Current statutory law does not tell the court that it indeed does have the authority to appoint an attorney for a proposed conservatee whose capacity to hire a lawyer is in question. This proposal would provide statutory authorization for the appointment of a lawyer.

Illustrations: ***Give at least one specific example, preferably drawn from real life of how this proposal would solve the problem described above.***

In several instances, the Court of Appeals has held that so long as a client can identify an attorney as "my attorney," the client has the capacity to hire that attorney, and the court no longer has the power to appoint counsel for that client. This proposal would clearly assert the power of the court to appoint counsel where the court believes it would assist in the resolution of the matter to do so. In so doing, the court, and the proposed conservatee, would obtain an unbiased counsel to report on the proposed conservatee's desires.

Documentation: ***Does documentary evidence (e.g., studies, reports, statistics or facts) exist which supports your conclusion that there is a problem? If so, please list. Be as specific as possible and attach major sources.***

Proponent is unaware of any studies, reports or statistics which support this proposal, although cases such as Sullivan v. Dunn, and People v. Stanley cited infra, and Conservatorship of Chilton, 8 Cal. App. 3d. 34, 86 Cal. Rptr. 860 (2nd

District 1978) and Conservatorship of David L. (2008) suggest that the problem is real . . . and growing, as the population ages.

History: ***Describe any similar proposals considered by the State Bar or the Legislature.***

AB 1491, of the 1999 Legislative session was dropped. More recently, a provision in AB 1938, which dealt with similar issues were deleted from the bill over what appear to have been funding objections. The Judicial Council Task Force on Conservatorship Reform has recommended enacting legislation that would require the appointment of counsel for a proposed conservatee in all cases.

Pending Litigation: ***List any litigation currently pending of which you are aware which would be impacted by this legislation if enacted.***

None known.

Likely Support/Opposition: ***Which major interest groups, organizations, professional associations, governmental agencies, key lawmakers, etc. are likely to support this proposal? Which are likely to oppose it? Why? What arguments will be made against it?***

Proponent anticipates that possibly some mental health patient's-rights advocate groups might oppose this, contending that, no matter how grievously mentally impaired a person is, he or she has the "right" to select an attorney, even if others question the choice of attorney.

Fiscal Impact: ***How much will it cost? How will these costs be funded?***

The fiscal impact is unknown, but likely to be limited. Where a neutral attorney is able to persuade a proposed conservatee not to fight a conservatorship, trials might be eliminated. If a second attorney is appointed, there could be additional attorneys' fees, but those fees are typically borne by the conservatee's estate. Only where the conservatee is without funds would the county need to pay a fee. In such cases, however, it is unlikely that the proposed conservatee would have otherwise retained counsel and current law would require an appointment in that circumstance.

Germaneness: ***(1) Is the subject matter of the bill necessarily or reasonably related to the regulation of the legal profession or improvement of the quality of legal services? or (2) Does the matter require the special knowledge, training, experience or technical expertise of the section? Please discuss how and why.***

The subject matter is directly related to the practice of the members of the Estate Planning, Trust and Probate Law Section. The Section has the particular expertise pertaining to the management of the affairs of incompetent persons.

Proposed Legislation: Probate Code Section 1470(a) is amended to read as follows:

1470(a): The Court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines ~~the person is not otherwise represented by legal counsel and~~ that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interest. The court may make such appointment of private legal counsel selected by the court notwithstanding the fact that the person may also be represented by other legal counsel.

Proposed Rule of Court:

Rule 7.1101: Guidelines for counsel appointed by the court under Probate Code Sections 1470 and 1471.
Counsel's primary duty shall be to represent the interest of his/her client in accordance with the laws and ethical standards which apply to the representation of clients in general.

(NOTE: TO BE PRINTED ON COMMITTEE LETTERHEAD)

LEGISLATIVE PROPOSAL

To: Saul Bercovitch, Legislative Counsel

From: Peter S. Stern, Chair, Trusts and Estates Executive Committee
Richard Burger, Chair, Trusts and Estates Administration Subcommittee
David B. Gaw, Advisor, Trusts and Estates Executive Committee

David W. Baer, Member, Trusts and Estates Executive Committee

Date: July 19, 2008

Re: An act to amend §§ 16061.5(a), 16061.7(a), and 16061.8 of the Probate Code

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: July 19, 2008
Approval Vote: _____

Contact Information:	**Section Legislative Co-Chairs:**
David B. Gaw Gaw, Van Male, Smith, Myers & Miroglio 1000 Main Street, 3rd Floor Napa, CA 94559 Phone: 707-252-9000 Fax: 707-252-0792 dave@gawvanmale.com David W. Baer Hanson Bridgett LLP 425 Market Street, 26th Floor San Francisco, CA 94105 Phone: 415-995-5031 Fax: 415-995-3413 dbaer@hansonbridgett.com	Silvio Reggiardo III Downey Brand et al LLP 555 Capitol Mall 10th Floor Sacramento, CA 95814 Phone: 916-441-0131 Fax: 916-441-4021 sreggiardo@dbsr.com Edward Joseph Corey, Jr. Weintraub Genshlea Chediak LC 400 Capitol Mall 11th Fl Sacramento, CA, 95814 Phone: (916) 558-6000 Fax: (916) 446-1611 ecorey@weintraub.com

SUMMARY OF PROPOSAL: This proposal clarifies who is entitled to receive notice and a copy of a trust when the trust becomes irrevocable (such as on the death of a person who established the trust), and when there is a change in trustee of an irrevocable trust. Second, this proposal closes a loophole that may permit the evasion of the required notice of a trust administration under the literal terms of the present statute. Third, this proposal clarifies that late

service of notice is nonetheless effective to commence the running of the 120-day statute of limitations to file a contest. Fourth, this proposal clarifies that persons damaged by a trustee's failure to provide the required notice of a trust administration can bring an action against the trustee, that attorney's fees and costs incurred in attempting to recover assets wrongly transferred by the trustee constitute damages recoverable in such actions, and that the trustee is immune from liability in such actions where he or she has exercised diligence in attempting to comply with the notice requirement. Fifth, the proposal allows the trustee to refrain from distributing any trust assets until the expiration of the 120-day statute of limitations unless the court orders a distribution to someone who was dependent for support on the now deceased person who set up the trust.

ISSUES:

1. What do you see as the key issues raised by this proposal? There are five key issues raised by this proposal: (A) reconciling the statute that requires a trustee to provide a copy of a trust and the statute that requires notice of a trust administration; (B) closing a loophole that may permit the evasion of notice requirements in a trust administration; and, (C) clarifying the effect of providing a tardy notice of trust administration; (D) clarifying the extent of trustee liability and immunity where the trustee has not complied with Probate Code Section 16061.7; and (E) establishing that the trustee has no legal obligation to make distributions during the 120-day statute of limitations period when the trust can still be contested, except where the court orders a distribution to avoid financial hardship.

2. What are the deficiencies in the law that this proposal seeks to remedy?

(A) Probate Code § 16061.5(a) contains two inconsistencies with Probate Code § 16061.7:

(1) Section 16061.7(a)(2) requires the notice to be sent when there is a change of trustee of an irrevocable trust, and the notice must state that the recipient is entitled to a complete copy of the trust. However, § 16061.5 does not require the trustee to provide a copy of the trust when there is a change of trustee. Consequently, an ambiguity exists as to whether the trustee is required to provide a copy of the trust when there is a change of trustee.

(2) Section 16061.7(b)(1) limits the notice requirement by reference to § 15804, but § 16061.5 has no such limitation. Sections 16061.5 and 16061.7 both require notice by reference to the term "beneficiary." The term "beneficiary" in the trust context is defined very broadly in § 24(c), and may include persons who are extremely unlikely to ever become entitled to a distribution from the trust. Section 15804 limits the class of persons entitled to notice, such that notice need not be provided to an indefinite number of heirs or remote beneficiaries. The lack of a specific reference to Section 15804 in Section 16061.5 may mean that persons who are extremely unlikely to ever become entitled to a distribution from the trust may nevertheless obtain a copy of the trust.

(B) Probate Code § 16061.7(a) requires notice of a trust administration be provided when a trust becomes irrevocable due to the death of the settlor. The notification must be sent to the settlor's heirs and to the beneficiaries of the trust. However, the literal terms of the statute may not require notice upon the death of a settlor who created an ostensibly

irrevocable inter vivos trust but retained general power of appointment. Even though the settlor retained the right to amend the plan of distribution until death in the same manner in a revocable trust, the notice requirement is not triggered because such a trust technically was irrevocable upon creation, not upon the death of the settlor. This loophole could be used to conceal elder abuse by preventing interested persons from receiving notice, which would give them the opportunity to challenge the trust.

(C) Probate Code § 16061.8 provides that service of notice "pursuant to this chapter" starts the running of certain deadlines to file a contest. Since the section sets forth a specific time frame for notification, notice that is served late technically does not constitute notice "pursuant to this chapter." Consequently, the statute of limitations may never begin to run where notice is served late.

(D) Probate Code § 16061.9(a) provides that a trustee who fails to serve a Section 16061.7 notification on a beneficiary shall be responsible for all damages, attorney's fees and costs caused by that failure. Because the statute lists damages and attorney's fees separately rather than including attorney's fees as an element of damages, arguably the attorney's fees incurred in the suit against the trustee are recoverable when the beneficiary prevails. It is doubtful that this was the Legislature's intent.

(E) Probate Code § 16061.9(c) authorizes the trustee to "consider" the fact that the statute of limitations for a trust contest has not expired in determining the timing and nature of the distribution of trust assets. This provides the trustee little guidance or protection in actually making distribution decisions. In making distribution decisions, general trust law principles enable trustees to consider whether an heir or beneficiary could still bring a trust contest in any event.

3. How does this proposal remedy the problem?

(A) This proposal would remedy the inconsistencies between Probate Code §§ 16061.5(a) and 16061.7 with respect to whether a copy of the trust must be provided upon change of trustees. For example, suppose that there is a change of trustees of an ongoing irrevocable trust. This triggers the requirement that certain persons be provided with a notice under § 16061.7, which notice states that the persons receiving it are entitled to a copy of the trust. However, the statute requiring that the trustee actually provide a copy of the trust (§ 16061.5), only requires that a copy of the trust be provided upon the trust becoming irrevocable. It does not require the trustee to provide a copy of the trust upon change of trustees. This proposal would correct this inconsistency by requiring a copy of the trust to be provided whenever notice is required under Section 16061.7.

(B) This proposal would limit the persons entitled to obtain a copy of the trust to those entitled to notice of the trust administration. For example, suppose that Hal and Wendy are a husband and wife with a joint revocable trust. The trust provides for the establishment of an irrevocable trust upon the death of the first spouse, which will distribute its income to the surviving spouse during his or her lifetime. Upon the surviving spouse's death, the assets of the trust are to be distributed to Hal and Wendy's children. In the event that a child predeceases the surviving spouse, that child's share will be distributed to the child's issue. If all children and their issue predecease the surviving spouse, the assets will be distributed to the

heirs of the first spouse to die. Upon Hal's death, he is survived by Wendy, ten children, fifty grandchildren, and a ninety-nine year old brother named Bob (from whom Hal has been estranged for the past fifty years). Hal has no other heirs. The only way that Bob would actually receive a distribution from the irrevocable trust would be if all ten children, all fifty grandchildren, and any issue born after Hal's death all predeceased Wendy. Bob is not entitled to notice under Section 16061.7 because the notice requirement is limited by Section 15804. Nevertheless, Bob may be entitled to a copy of the trust because there is an extremely remote possibility that he may one day be entitled to the assets of the trust. This proposal would change this, by permitting only those persons entitled to notice of the trust administration under Section 16061.7 to obtain a copy of the trust.

(C) This bill would require notice of a trust administration upon a settlor's death if the settlor had created an irrevocable trust and retained a power of appointment. For example, suppose that Settlor has two children, Able and Baker. Able uses undue influence to convince Settlor to create an irrevocable trust with Settlor as the beneficiary during his lifetime, and Able as the beneficiary after Settlor's death. The trust names Able as the current trustee. Settlor dies without exercising the power of appointment. Under the literal terms of Probate Code § 16061.7, Able would have no duty to notify Baker because the trust technically did not become irrevocable due to Settlor's death, and because there was no change in trustees. This proposal would require Able to notify Baker (as an heir of Settlor) due to Settlor's retained power of appointment, the same result as if Settlor had retained the power to revoke the trust.

(D) This proposal would provide that a late served notice would prospectively provide protection to the trustee. For example, suppose that Settlor dies on January 1, 2008, triggering the notice requirement under Probate Code § 16061.7. The trustee serves the required notice along with a copy of the trust on July 1, 2008. The 120 day deadline to file a contest provided under Probate Code section 16061.8 may never start to run because the commencement of this period is triggered by the service of notice "pursuant to this chapter," and Probate Code § 16061.7(f) requires notice to be served within sixty days of date of death. Consequently, it could be argued that the time to contest the trust could never be triggered by any notice served later than March 1, 2008 (sixty days from Settlor's death). The proposed amendment would clarify that the statute of limitations to file a contest of the trust will be triggered by notice served later than the sixty day period described in Probate Code § 16061.7(f). It should be noted that the proposed amendment will not affect the liability of the trustee for damages arising from the failure to serve timely notice pursuant to Probate Code § 16061.9.

(E) This proposal would provide that in an action against the trustee to recover any damages caused by the trustee's violation of Probate Code § 16061.7, the petitioner will be able to recover any attorney's fees and costs reasonably incurred in the course of attempting to recover any trust assets that the trustee wrongfully transferred to a third person. This language better expresses what seems to have been the Legislature's original intent. The recovery of attorney's fees in the action against the trustee itself would be governed by the rules generally applicable in breach of trust suits. For example, a trustee could fail to serve the required Probate Code § 16061.7 on an heir who is "disinherited" by a trust amendment, then distribute trust assets to the beneficiaries named in the amendment. The "disinherited" heir could prevail in a suit contesting the amendment, but nonetheless be unable to recover (or fully

recover) if the beneficiaries under the amendment have already expended the inheritances that were not rightly theirs. If the trustee was negligent in failing to comply with Probate Code § 16061.7, the heir could sue the trustee and, if the trustee did not exercise reasonable diligence in attempting to comply with Probate Code section 16061.7, recover the attorney's fee and costs incurred in the prior suit against the beneficiaries contesting the amendment.

(F) Under this proposal the trustee's exercise of reasonable diligence in determining the identity and mailing address of a beneficiary or heir will constitute a complete defense to an action against the trustee brought by a beneficiary or heir who did not receive a Probate Code § 16061.7 notification. The rule is the same for both beneficiaries and heirs. For example, if the trustee mails a Probate Code § 16061.7 notification to an heir, but the notification is returned in the mail stamped "unknown at this address," the trustee must exercise reasonable diligence in determining the heir's current address to be entitled to immunity under § 16061.9(b).

(G) Under this proposal the trustee can decline to make any distribution from the trust until the 120-day statute of limitations expires. The court can order a trustee to make a distribution sooner so that a beneficiary will not suffer financial hardship. The 120-day statute of limitations is particularly short, and in most instances justifies protecting trustees from being pressured to make distributions before the trustee knows whether anyone to whom a Probate Code § 16061.7 notification has been mailed will file a trust contest. The proposed statute would not, however, prohibit a trustee from exercising discretion to make a distribution to a beneficiary before the 120-day statute of limitations has run.

HISTORY: Has a similar bill been introduced either this session or during a previous legislative session? The author is not aware of any similar bills that have been introduced to modify these statutes in the manner described.

IMPACT ON PENDING LITIGATION: Will the bill have any impact on litigation currently pending? If so, please explain. The author is not aware of any litigation currently pending regarding the issues addressed by the proposal.

LIKELY SUPPORT & OPPOSITION: What major interest groups, organizations, professional associations, governmental agencies, key lawmakers, individual attorneys, etc., are likely to support this proposal? Which are likely to oppose it? Why? What arguments will be made against it?

Support: The Committee believes that the proposed legislation will more than likely find support by professional and corporate trustees, as well as counsel for individual (non-professional) trustees.	Why? This proposal will prevent evasion of the notice requirements relative to trust administrations called for under the Probate Code.
Oppose: This proposal is not likely to generate substantial opposition.	Why? Include possible arguments in opposition. Inasmuch as this proposal is designed to clarify ambiguities in existing law consistent with current practices, substantial opposing arguments are not likely.

FISCAL IMPACT: No anticipated fiscal impact.

GERMANENESS: Drafting a proposal such as this requires an understanding of the interests of both trustees and trust beneficiaries. The members of the Trusts and Estates Executive Committee have interest and expertise in these areas.

TEXT: The following amendments are made to Probate Code §§ 16061.5(a), 16061.7(a) and (b), 16061.8 and 16061.9(a), (b), and (c):

16061.5(a) A trustee shall provide a true and complete copy of the terms of the irrevocable trust, or irrevocable portion of the trust, to *each of the following*:

1. Any beneficiary of the trust who requests it, *subject to the limitations of Section 15804*, and to any heir of a deceased settlor who requests it, when a revocable trust or any portion of a revocable trust becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

2. Any beneficiary of the trust who requests it, *subject to the limitations of Section 15804, whenever there is a change of trustee of an irrevocable trust.*

3. *If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General.*

16061.7(a) (a) A trustee shall serve a notification by the trustee as described in this section in the following events:

(1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

(2) Whenever there is a change of trustee of an irrevocable trust. The duty to serve the notification by the trustee is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification.

(3) *Whenever a power of appointment retained by a settlor is effective or lapses upon the death of a settlor with respect*

to an inter vivos trust which was or purported to be irrevocable upon its creation.

16061.8 No person upon whom the notification by the trustee is served pursuant to this chapter *whether the notice is served on him or her within or after the time period set forth in subsection (f) of Section 16061.7* may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later.

16061.9 (a) ~~A trustee who fails to serve the notification by trustee as required by Section 16061.7 on a beneficiary shall be responsible for all damages, attorney's fees, and costs caused by the failure unless the trustee makes a reasonably diligent effort to comply with that section.~~ *Except as provided in subdivision (b), a trustee who fails to comply with Section 16061.7 shall be responsible for all damages caused by the failure including, but not limited to, attorney's fees and costs reasonably incurred by or on behalf of the petitioner in attempting to mitigate damages.*

(b) ~~A trustee who fails to serve the notification by trustee as required by Section 16061.7 on an heir who is not a beneficiary and whose identity is known to the trustee shall be responsible for all damages caused to the heir by the failure unless the trustee shows that the trustee made a reasonably diligent effort to comply with that section. For purposes of this subdivision, "reasonably diligent effort" means that the trustee has sent notice by first-class mail to the heir at the heir's last mailing address actually known to the trustee.~~ *The trustee's exercise of reasonable diligence in ascertaining the identity and mailing address of the beneficiary or heir and otherwise complying with Section 16061.7 shall constitute a complete defense to any action based on the beneficiary's or heir's failure to receive the notification as required by Section 16061.7.*

(c) A trustee, in exercising discretion with respect to the timing and nature of distributions of trust assets, may consider the fact that the period in which a beneficiary or heir could bring an action to contest the trust has not expired.

[ALTERNATE]

(c) Except as provided in subdivision (d), prior to the expiration of the statute of limitations under Section 16061.8 a trustee shall have no obligation to make any distribution of trust assets. Nothing in this subdivision is intended to preclude a trustee from making a distribution of trust assets prior to the expiration of the statute of

limitations under Section 16061.8 in the exercise of the trustee's discretion.

(d) *Any beneficiary who was a spouse, a minor child, a domestic partner, or actually dependent in whole or in part on the deceased settlor for support at the time of the settlor's death, or any person authorized to file a petition on behalf of such a beneficiary including, but not limited to, a trustee, conservator, attorney in fact, or guardian ad litem, may file a petition for an interim distribution of trust assets prior to the expiration of the statute of limitations under Section 16061.8. Such a petition shall only be granted: (1) on a showing of the probable validity of the trust provision in favor of the beneficiary; (2) on a showing that there is no other readily available source to provide for the beneficiary's maintenance pending the expiration of the statute of limitations; and (3) to the extent that distribution is necessary for the beneficiary's maintenance pending the expiration of the statute of limitations and does not exceed the amount to which the beneficiary is entitled under the trust. A beneficiary who receives a distribution pursuant to an order issued under this subdivision shall reimburse the trust to the extent that the distribution exceeds the amount to which the beneficiary is ultimately determined to be entitled under the trust.*

MEMORANDUM

To: TEXCOM
From: Richard Burger, on behalf of the Trusts and Estates Administration Committee
Date: 7/15/2008
Re: Trustee notification legislative proposal (§ 16061.5 et seq.)

Introduction

This rather ambitious legislative proposal began as a simple request to fix a loophole in the trustee notification scheme. It then grew a bit to include a clarification of the effect of late notice, and then accommodated several issues raised in Jim Lamping's Spring 2007 Quarterly article. Finally, last month David Baer came up with some additional suggestions, all of which are interesting and some of which will likely be controversial.

The proposal can probably be seen as several independent modules. These range from easy technical fixes that virtually everyone will likely approve, to more involved changes that may be met with greater skepticism, to a rather bold new proposal that will probably be controversial.

The portions of the legislative proposal which are relatively non-controversial are set forth in Times New Roman font.

The portions of the legislative proposal which have received little TEXCOM review and which are more controversial are set forth in Arial font.

TEXCOM may approve only the modest fixes, or it may decide to go further and include the entire proposal. Or TEXCOM may ask Administration to come back in September with a revised proposal. An approval at the July meeting would allow us to forward the proposal to the Board of Governors before the 2008 deadline in early August, which could result in legislation next year.

The Easy Fixes

These changes should be non-controversial, and I would expect TEXCOM to approve them nearly unanimously.

1. This proposal closes a loophole which is being used to avoid the requirement of notification. Example: Mom has two children, child #1 and child #2. Mom creates irrevocable trust, with Mom as sole beneficiary during Mom's lifetime. Mom retains a general or limited power of appointment. Mom names child # 1 to serve as trustee

immediately. No § 16061.7 notification is required when Mom dies, since the trust was technically irrevocable upon creation and there is no change of trustee upon Mom's death. This proposal fixes that loophole. This was discussed at the June meeting, and TEXCOM had no comments or changes.

2. This proposal makes is clear that late notification is nevertheless effective. A potential problem now exists if the § 16061.7 notification is mailed out late. Section 16061.8 creates a 120-day statute of limitations when notification is served "pursuant to this chapter." But if notice is mailed later than the 60 days required under § 16061.7(f), the late notice is arguably not "pursuant to this chapter," and therefore the 120-day statute does not apply. This proposal states that late notice triggers the 120-day limitation (beginning with the late notice). This was discussed at the June meeting, and TEXCOM had no comments or changes.

The changes stemming from Jim Lamping's Quarterly article

Some of these changes are a bit more problematic, not because they are inherently controversial, but because it is often difficult to draft such changes without creating unintended consequences. I nevertheless believe predict that they will be acceptable to most TEXCOM members.

3. The proposal makes it clear that both types of notification (death of settlor and change of trustee) should include the beneficiary's right to request copy of trust. The notification should include the beneficiary's right to request a copy of the trust upon change of trustees of an irrevocable trust, as well as upon death of the settlor of a revocable trust. The proposal makes this clear. This was discussed at the June meeting, and TEXCOM had no comments or changes.

4. The proposal makes no change to the persons who should receive the notice under 16061.7. TEXCOM has directed that trust "beneficiaries" entitled to notice should include those who are beneficiaries under the trust – as the trust was last amended prior to the settlor's death. This is not what Administration proposed at the June meeting. The June version included all persons who are beneficiaries under the "terms of the trust" (i.e., those under the original trust and all of its amendments, or if the trust had been restated, those under the restated trust and all subsequent amendments). At the June meeting, TEXCOM discussed various alternatives (including one in which all persons who were beneficiaries under any trust and amendments executed within 3 years of the settlor's death would be notified), and voted to limit notification to those who are beneficiaries under the trust as amended. (The vote was: 17 yes; 4 no; 5 abstain.) We believe this is what the existing statutory language in § 16061.7(b)(1) prescribes, and therefore are not making any changes to § 16061.7(b)(1).

5. This proposal specifies who should be authorized to request a copy of the trust. The same persons who are entitled to receive notice under § 16061.7(b)(1) should be entitled to obtain a copy of the "terms of the trust." The § 15804 qualification to the term "beneficiary" exists under the § 16061.7(b)(1) *notification* provision, but does not presently exist under the § 16061.5 provision that a trustee provide a copy of the trust to any beneficiary *who requests it.* Note that the beneficiary may request a copy of the entire "terms of the trust," which includes all amendments made since the last restatement.

Although some believe that the term "beneficiary" is fine as it is, Administration attempted to be more specific, so it would be clear that remote beneficiaries need not be noticed. We made several efforts to spell this out (for example, "...who is currently entitled to a distribution of income or principal, or who would be entitled to a distribution of principal if the trust were terminated..."), but soon realized that our language would not cover every situation, and instead – somewhat reluctantly – we decided to "punt" and refer to § 15804. We don't like § 15804, since it's either obtuse or unclear, but we couldn't seem to draft a better alternative that worked in all situations.

David Baer's less controversial additions

David Baer has proposed some changes which are either non-controversial or only modestly controversial.

6. This proposal clarifies that the trustee is liable to both heirs and beneficiaries for failing to notify, and that the recoverable attorney's fees within the scope of the statute are only those which were are incurred as damages, i.e., in attempting to mitigate the loss, as opposed to attorney's fees incurred in the action against the trustee itself. Section 16061.9(a) makes the trustee who fails to notify under § 16061.9 liable to beneficiaries for "all damages, attorney's fees, and costs incurred..." Subsection (b) makes the trustee only liable for "all damages..." This proposal makes no distinction between heirs and beneficiaries, and makes the trustee liable for "any damages caused by the trustee's failure to comply with Section 16061.7...including...attorney's fees and costs...incurred ...in attempting to mitigate damages." The court would rule on any claim for the attorney's fees incurred in the suit itself based on the rules generally applicable to such suits against trustees. The proposes statute makes no separate rule for this.

7. The proposal provides a clear defense for a trustee who follows the notification rules. A trustee who exercises reasonable diligence in identifying the identity and mailing address of a beneficiary or heir and otherwise complies with § 16061.7 would have a complete defense against that heir or beneficiary who sues the trustee based on not receiving notice.

8. The proposal makes mailing to "last known mailing address" of an heir alone insufficient. The proposal requires the trustee to exercise "reasonable diligence" in ascertaining the identities and mailing addresses of both beneficiaries and heirs. This was discussed at the June meeting, and apparently something like this was part of the Executive Committee's proposal when § 16061.9 was first proposed by the legislature. At that time, the California Bankers Association lobbied to have the bill changed to include a more lenient (but unjustified) standard for notice to heirs.

David Baer's controversial changes

David has also proposed some changes which will likely be controversial.

9. The proposal explicitly states that a trustee is not required to make any distributions to beneficiaries during the contest period, but allows a court to order that preliminary distributions be made to certain dependent beneficiaries. The current law says that the trustee "may consider the fact" that the 120-day period has not run, but does not give the trustee complete protection if he makes no distributions during this period. The proponents of a change argue that § 16061.9(c) says nothing, and some language is needed to give trustees complete immunity from making distributions to persons who may turn out to be wrong ones, which could potentially damage the right ones. The proposal does not prohibit the trustee from making distributions during this period. The trustee may do in the trustee's discretion or, as explained, pursuant to court order.

Since even in the 120-day window for contesting the trust this new subsection (c) could create hardship for some beneficiaries, such as spouses, domestic partners, minor children and others who were dependent on the deceased settlor, new subsection (d) provides that a court may order the trustee to make a preliminary distribution to the beneficiary if the trust is likely to be valid, and if the distribution is needed by the beneficiary. Unlike a spousal allowance, however, subsection (d) also confirms that the distributee must return the money if the court later finds that he or she was not entitled to it. Nothing in the statute prohibits a trustee from using the notice of proposed action procedure as another means to establish immunity for making a distribution in the 120-day window, although it does not expressly authorize this either. David believes that it is implicit that this procedure is available.

MEMORANDUM

TO: EP Subcommittee

FROM: Richard L. Ehrman, Nancy E. Howard, Rebecca L.T. Schroff

DATE: May 8, 2008

RE: Disinheritance by Negative Will – Effect of a Failed Residuary Clause on a Disinherited Heir

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Question: Should TEXCOM sponsor legislation to modify existing law so as to allow a testator to disinherit his or her statutory heirs?

Current California case law does not allow a so called "negative will" which would permit a testator to disinherit an heir from receiving his or her intestate share of the estate. Some states instead have adopted a version of the Uniform Probate Code § 2-101 which does allow a testator to disinherit a particular heir.

- Consider for example, Adam's will which says: "I leave everything to my brother Bob. I disinherit my sister Cathy." If Bob predeceases Adam without issue, the residuary gift fails and the estate is distributed under the laws of intestacy. If Cathy survives Bob and Adam, should she receive all of Adam's estate or should she be disinherited?

- Under current California law Cathy would receive Adam's entire estate (assuming Adam has no closer intestate heir) even though she had been disinherited in Adam's will. Under the UPC-type provisions, Cathy would be disinherited.

This memorandum summarizes the issue, reviews California's and some other jurisdictions' treatments of the issue, and discusses some alternatives that could be considered. It is our recommendation that TEXCOM not propose a change in the law, for the reasons discussed below.

California law

California law does not allow an heir at law to be disinherited. Probate Code § 6400 provides:

> **"Probate Code §6400 – Property subject to intestacy provisions**
>
> "Any part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs as prescribed in this part."

California cases follow the so-called "American Rule" that does not allow a decedent who dies intestate, either in whole or in part, to disinherit a statutory heir by will. *Estate of Anna B. Dunn, et. al., v. Irving F. Dunn, et. al.*, (1953), 120 Cal. App. 2d 294; *Estate of John S. Hittell,*

et. al., v. Anna P. Greet, (1903) 141 Cal. 432; *Estate of Ellen Sessions, et. al., v. James Hunter, et. al.*, (1915) 171 Cal. 346, *Estate of Alexander Henderson Moore v. Trinity Methodist Church,* (1963) 219 Cal.App.2d 737.

Alternative Approaches

In contrast, the "English Rule" allows a testator to disinherit an heir at law in his or her will so long as the testator clearly expresses the intent to disinherit the heir and so long as there is at least one other heir (other than the state) who can take by intestacy.

The Uniform Probate Code, as revised in 1990, follows the "English Rule" and allows a testator to exclude heirs from the testator's intestate estate by use of a so-called "negative will." UPC § 2-101 provides:

> "(a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will.
>
> "(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share."

Attached as Exhibit 1 is the UPC provision and commentary.

Other Jurisdictions

We have not conducted a state-by-state search to determine whether any or all of the states that have adopted the UPC have also adopted this particular rule. (We heard from the former Chairperson of the Georgia Probate Code Revision Committee that, although Georgia adopted the UPC, it did not adopt this specific provision of the UPC.) The subcommittee's preliminary review suggests that South Dakota and Montana have adopted this provision of the UPC and that Florida, Connecticut, Georgia, and North Dakota (*Estate of Robert G. Jetter*, (1977) 1997 SD 125) follow the American Rule.

Arguments For And Against

Arguments in favor of the current California rule include the following:

- The current rule is a clear rule that can be addressed by proper drafting.
- Public policy does not favor escheatment and the American Rule prevents escheatment.

- Allowing the testator to disinherit an heir at law would be an impermissible attempt to alter the intestacy scheme.

- Allowing the testator to disinherit an heir at law would allow judicial drafting of testamentary instruments.

- Litigation would increase because, under the UPC/"English Rule," each case is decided by determining the testator's intent, based on the facts.

- Extrinsic evidence will be required in many cases to determine the testator's intent, increasing the time, cost, burden on the courts and parties, and general nastiness of the litigation. Such litigation is likely to turn into a "beauty contest" among the disinherited heir and alternate takers.

- Altering the rule will require the statute and/or the courts to address difficult factual and legal issues, such as what constitutes a disinheritance, who bears the burden of proof, what extrinsic evidence should be allowed to determine the testator's intent, and how the alternate takers should be determined.

Proponents of the UPC or "English Rule" argue that determining the testator's intent is paramount and should be given effect if at all possible. Arguments include:

- By ignoring language in the testator's will that clearly states his or her intent, the American rule frustrates what should be the ultimate goal of the law.

- Escheatment can be prevented by language requiring that at least one statutory heir (other than the state) is eligible to inherit the estate even if the testator's disinheritance clause is given effect.

- Extrinsic evidence is necessary to determine the testator's intent and the statute should not prevent litigation necessary to make this determination.

If TEXCOM were to propose a change in the current California law to some version of the UPC or English rule, we would need to address the following issues:

- **What would constitute an express disinheritance in a testator's Will? Should it require**:

    - Failure to provide for X?

    - Gift of $1.00 to X?

    - Specific disinheritance of a class to which X belongs but without naming X?

- Specific disinheritance of (i.e., by naming) X?
- Specific disinheritance of (i.e., by naming) X with language "under any and all circumstances" (or substantially similar language)?
- Gift of $50,000 to X for the purpose of giving teeth to a no contest clause.

- **What should the default be (*i.e.*, who should have the burden of proof)?**
  - Should the statute address the burden of proof?
  - If the proposed legislation addresses the burden of proof:
    - Should the intestate heirs who are not disinherited have to prove that the testator intended to disinherit a particular heir even if the residuary gift fails?
    - Alternatively, should the disinherited heir have to prove that the testator nevertheless would have intended him or her to inherit if the residuary gift fails?
    - What should be the standard, in either case? Clear and convincing evidence? Preponderance of the evidence?
- **Should extrinsic evidence be allowed?**
- **Should the statute be conditioned on there being at least one heir (other than the state) who is not disinherited and who could take under intestacy, so that property does not escheat to the state?**
- **If a disinherited heir is excluded from taking by intestacy, how should that share be disposed of?**
  - As if the disinherited heir had disclaimed?
  - As if the disinherited heir had predeceased the testator?

It is our subcommittee's unanimous recommendation that we not propose a change in the current California law. We believe that the benefits of certainty and predictability, and the consequent avoidance of difficult and costly litigation, outweigh the disadvantage of the possible occasional frustration of a testator's intent, particularly where that intent could be achieved by proper drafting.

If the Estate Planning subcommittee nevertheless believes that we should proceed, then we recommend that we present a straw poll at the next TEXCOM meeting with the question:

> Should TEXCOM promote legislation to modify existing California law so as to allow a testator to disinherit his or her statutory heirs by Will?

If the answer were yes, then we could take further straw polls on the subsidiary questions listed above, to give more guidance to the subcommittee in developing a legislative proposal.

[End]

REPORT FROM CLRC COMMITTEE

1. Donative Transfer Restrictions

The CLRC Committee voted unanimously to recommend that Texcom support the June 2008 Tentative Recommendation and that the CLRC Chair write a letter to CLRC in support of the recommendation. The CLRC Committee asks that Texcom members write their own letters of support and urge other practitioners to do so. Among the significant changes that the Tentative Recommendation makes to the current law are the following:

1. Limit the definition of "care custodian" to a person who provides health or social services for remuneration, as a profession or occupation. In other words, a Good Samaritan or a neighbor who does not receive payment or who does not provide health or social services as a profession or occupation would not be subject to the statutory presumption of fraud or undue influence.
2. Limits the application of the presumption of fraud or undue influence to donative instruments executed while the person was providing care custodian services to the transferor. The presumption will not apply if a donee later provided care custodian services or had earlier provided care custodian services.
3. Defines "dependent adult" to apply only to adults for whom the court would have appointed a conservator of the person.
4. Allows the drafting attorney to provide a certificate of independent review for a gift to a care custodian, but not for a gift to a person who drafts the instrument or a fiduciary who transcribes the instrument.

The letters should be emailed before August 8 to bhebert@clrc.ca.gov or addressed to California Law Revision Commission at 4000 Middlefield Road, Room D-1, Palo Alto, CA 94303-4739.

2. Transfer-on-death deed: dead or alive? Charlotte Ito will report.

3. SB 1264. The bill has been enrolled and is on its way to the Governor. A copy of SB 1264 is in your agenda materials.